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In The
Supreme Court of the United States

ROLAND A. SHELTON,

Petitioner,

v.

MARYANN C. SHELTON

On Petition For A Writ Of Certiorari To The Supreme Court Of Nevada

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

May state courts enforce divorce property settlements by compelling the remission of funds equivalent to veterans' disability pay, in contravention of federal statutes, 10 U.S.C. § 1408; 38 U.S.C. § 5301, and this Court's ruling in *Mansell v. Mansell*, 490 U.S. 581 (1989)?

LIST OF PARTIES BELOW

The Respondent, as indicated in the caption of the case as reported below, App. 1a, is now known as Maryann C. Mitchell.

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PETITION FOR WRIT OF CERTIORARI

The Petitioner, Roland A. Shelton, respectfully prays that a writ of certiorari issue to review the October 29, 2003, judgment and opinion of the Supreme Court of Nevada in the above-captioned proceeding.

OPINIONS BELOW

Petitioner seeks review of the opinion and judgment of the Nevada Supreme Court of October 29, 2003, styled as *Shelton v. Shelton* (Docket No. 37483), and reported at 78 P.3d 507 (Nev. S.Ct. October 29, 2003), and reprinted at App. 1a. The Nevada Supreme Court's decision came as an appeal of an Order issued by the District Court of Clark County, Nevada, of January 31, 2001, which was unreported, but is reprinted at App. 11a.

STATEMENT OF JURISDICTION

Petitioner seeks review from the opinion and judgment of the Supreme Court of Nevada of October 29, 2003. The U.S. Supreme Court has jurisdiction to review cases from state courts by virtue of 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This Petition implicates the power of states to override provisions of acts of Congress, in contravention of the Supremacy Clause of Article VI of the federal Constitution. See U.S. CONST. Art. VI, cl. 2 ("The Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be

bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.").

The federal statutes specifically at issue in this case are the Uniformed Services Former Spouses' Protection Act (USFSPA), codified at 10 U.S.C. § 1408, the relevant provisions of which are reprinted at App. 15a, as well as the nonattachment and exempt status provisions of the Veterans' Benefits Act (VBA), codified at 38 U.S.C. § 5301, reprinted at App. 24a.

STATEMENT

1. a. In exercise of its powers under the Constitution, U.S. CONST. art. I, § 8, cls.12 (Raise and Support Armies Clause) & 14 (Regulation of Armed Forces Clause), Congress has prescribed a wide array of benefits to the men and women who have served with honor in the United States armed forces. Among these benefits are the retired and retention pay that is rendered to enlisted personnel and officers who serve a statutorily-prescribed period of time on active duty (typically 20 years), and (though retired) are still obliged to comport themselves in accordance with the Uniformed Code of Military Justice and are subject to recall for active duty. See 10 U.S.C. §§ 1401 et seq.

Analytically distinct from retired or retention pay are veterans' disability benefits, including disability pay, which is offered to those present and former service members who have been found by the Veterans Administration to have actually accrued service-related disabilities. See 38 U.S.C. §§ 1101, 1110, 1131 et seq. Up until very recently,[1] a veteran who was eligible

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[1] See National Defense Authorization Act, 2004, Pub. L. No. 108-136, § 641, 117 Stat. 1392 (2003), which allows a phase-in of full concurrent receipt of military retired pay and veterans disability

for both retired pay and disability compensation was required to elect one or the other. See 10 U.S.C. § 1414; 38 U.S.C. § 5305. Since disability pay, unlike retired pay, is not subject to federal income tax, see 38 U.S.C. § 5301(a)(1); App. 24a, veterans have tended to select the receipt of disability pay.

b. Up until the early 1980's it was a matter of some controversy whether military retired pay was even divisible as a community asset in divorce proceedings involving a former member of the armed forces. In a 1981 decision, this Court in *McCarty v. McCarty*, 453 U.S. 210 (1981), ruled that federal law precluded state courts from dividing military nondisability retired pay pursuant to state community property laws. See id. at 235. This Court made clear in *McCarty* that disability compensation was an entirely different benefit, although subject to the same rules of federal preemption. See id. at 213.

In response to *McCarty*, Congress legislated in 1982 the Uniformed Services Former Spouses' Protection Act (USFSPA), codified at 10 U.S.C. § 1408; App. 15a. For the purposes of the present Petition, the crucial provisions of USFSPA concern Congress's grant to state courts of the authority to treat retired pay as property "solely of the [service] member or as property of the member and his spouse in accordance with the law of the jurisdiction. . . ." See 10 U.S.C. § 1408(c)(1); App. 18a. USFSPA by no means required states to treat military retired pay as divisible property, but merely allowed them to do so without any federal preemptive effect, should state community property

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compensation for certain military retirees. This possibility of concurrent receipts of retirement pay and disability compensation is not otherwise at issue in this case.

or divorce settlement laws so prescribe.[2] In any event, Congress took care in USFSPA to define what "disposable retired pay," id., was subject to division with a former spouse. Among the amounts required to be deducted from total retired pay, in order to calculate disposable retired pay, are any amounts that a veteran was obliged to waive as a condition of receiving disability compensation. See 10 U.S.C. § 1408(a)(4)(B); App. 17a.

An additional feature of USFSPA was an automatic payment procedure by which former spouses could directly receive court-ordered increments or shares of a veteran's retired pay, provided that certain statutory requisites were satisfied by the former spouse. See 10 U.S.C. § 1408(d). In addition, Congress imposed a percentage cap on amounts of a veteran's retired pay that could be directly remitted under this scheme. See 10 U.S.C. § 1408(e)(1); App. 19a. Congress also prescribed a carefully-constructed savings clause to govern situations where state courts ordered remissions of retired pay in excess of the statutory caps applicable to the automatic pay scheme:

> Nothing in this section shall be construed to relieve a [service] member of liability for the payment of alimony, child support, or other payments required by

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[2] Community property states had traditionally sought to include military retired pay as a marital asset. After USFSPA, most, but not all, of remaining states have, in fact, adopted statutory or common law rules of construction allowing the treatment of military retired pay as a marital asset subject to division upon divorce. See A Report to Congress Concerning Federal Former Spouse Protection Laws, Sept. 4, 2001, Appendix C, available at http://www.dod.mil/prhome/spouserev.html (visited Jan. 17, 2004) [hereinafter "DoD 2001 USFSPA Report"]. This Report was prepared in accordance with the congressional mandate of the National Defense Authorization Act, FY 1998, § 643, Pub. L. 105-85, 111 Stat. 1629 (1997).

> a court order on the grounds that payments made out of disposable retired pay under this section have been made in the maximum amount permitted under paragraph (1) or subparagraph (B) of paragraph (4). Any such unsatisfied obligation of a member may be enforced by any means available under law other than the means provided under this section in any case in which the maximum amount permitted under paragraph (1) has been paid . . .

10 U.S.C. § 1408(e)(6); App. 22a.

c. Any hopes that the enactment of USFSPA would conclusively and completely resolve the status of veterans' retired pay as marital property subject to division at divorce were quickly dashed. Indeed, state courts quickly proved their aptitude in evading USFSPA's restrictions in order to settle additional benefits on the former spouses of service members. Indeed, this Court was obliged in 1989, in *Mansell v. Mansell*, to address virtually the precise issue raised in this Petition: whether state courts "may treat as property divisible upon divorce military retirement pay waived by the retiree in order to receive veterans' disability benefits." 490 U.S. 581, 583 (1989). Writing for a majority of the Court (with O'Connor and Blackmun, JJ., dissenting), Justice Marshall concluded that "they may not." Id.

The *Mansell* Court was faced with a state court divorce decree and property settlement that was more ambiguous than the one presented here: Major Gerald Mansell agreed, at the time of his divorce, that his former wife, Gaye Mansell, would receive "50 percent of his total military retirement pay, including that portion of retirement pay waived so that [he] could receive disability payments." Id. at 586. Four years later, Major Mansell requested a modification of his divorce decree by removing the provision requiring him to share his total retired

pay with his former spouse. Id. California courts denied his motion, despite his challenge that such a ruling conflicted with both USFSPA and the anti-attachment provision of the Veterans' Benefits Act (at the time of the *Mansell* decision, codified at 38 U.S.C. § 3101(a), and now at id. § 5301(a); App. 24a).

Basing its holding on USFSPA, and declining to reach the nonattachment statute as an independent ground, 490 U.S. at 581 n.6, this Court held that USFSPA specifically preempted a state court's attempt to treat disability pay as a part of a veterans' disposable retired pay, subject to division as part of marital property under that statute. See id. at 588-90 (construing 10 U.S.C. § 1408(a)(4)(B); App. 17a, and id. § 1408(e)(6); App. 22a). The Court reached this conclusion, even as it acknowledged that "Congress, when it passes general legislation, rarely intends to displace state authority" over family law issues, and that this Court "will not find preemption absent evidence that it is ' "positively required by direct enactment"' ." Id. at 587 (quoting *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 581 (1979), and citing *Rose v. Rose*, 481 U.S. 619, 628 (1987)). Indeed, the *Mansell* Court concluded that "[t]he instant case, however, presents one of those rare instances where Congress has directly and specially legislated in the area of domestic relations." Id.

And, unlike the situation in the wake of this Court's decision in *McCarty*, Congress appears to have acquiesced in this Court's construction of USFSPA to the effect that amounts owing to a veteran as disability pay are not subject to being divisible as marital property upon divorce. Despite the fact that Congress has amended USFSPA no less than eight times after the *Mansell* decision was rendered, see App. 22a-23a, in no instance has Congress chosen to disturb that ruling or to otherwise amend the statute in a way material to the issues

raised in this Petition. As will be discussed presently, however, state courts have not been so respectful of this Court's ruling in *Mansell*, necessitating this Petition and this Court's intervention.

2. a. As the Nevada Supreme Court noted, App. 2a-3a, your Petitioner, Roland Shelton and Respondent, Maryann Shelton (now known as Maryann Mitchell), were married on September 1980. Roland served in the United States Navy for more than ten years during the marriage. On January 17, 1997, the Sheltons jointly petitioned for a summary decree of divorce in Clark County, Nevada, District Court. On January 29, 1997, the district court entered a decree of divorce incorporating the parties' joint petition. See App. 13a-14a.

Under the terms of the agreement, the parties designated both Mr. Shelton's military retirement pay and military disability pay as community property, although the agreement awarded all of the disability pay to Mr. Shelton. The parties agreed that Mr. Shelton, individually, would be allotted "half of [his] military retirement pay in the amount of $500 and military disability pay in the amount of $174." App. 13a. Mrs. Shelton would be allotted the other "half of HUSBAND'S military retirement pay in the amount of $577, until her demise." App. 14a. At the time of the divorce, Mr. Shelton had an outstanding military pension of $1,000 per month, and a disability payment of $174 per month based upon a determination that he was ten percent disabled. In the divorce settlement and decree, both spouses waived any right to spousal support. See App. 14a.

Beginning in January 1997, Mr. Shelton regularly made his required payments to his former spouse. In 1999, the Department of Veterans Affairs reevaluated Mr. Shelton's disability status and concluded that he was 100 percent disabled, effective May 1, 1998. Mr. Shelton elected to waive all of his

military retirement benefits for an equivalent amount of disability pay, as federal law allows. Upon receiving notice of an increased disability rating on February 26, 1999, Mr. Shelton ceased his payments to his former spouse under the terms of the divorce decree.

b. Mrs. Shelton then proceeded in November 2000 to enforce the divorce decree, to have cause shown why Mr. Shelton should not be held in contempt, and a claim for judgment. The former Mrs. Shelton asked for half of Mr. Shelton's military pension, or $577, as had been agreed upon before the divorce and as was incorporated in the divorce decree. Mr. Shelton opposed her motion on the grounds that the divorce decree did not allocate any disability pay to her, and that federal law prohibited community property division of veterans' disability benefits. The Clark County District Court denied Mrs. Shelton's motion on the basis of this Court's decision in *Mansell* and also held that federal law prevented states from treating military disability pay as divisible community property. See App. 12a. The district court also refused to grant Mrs. Shelton equitable relief for the loss of her $577 monthly income on the basis that it lacked jurisdiction to hear a request for alimony when alimony had been waived in the final divorce decree. Id.

c. On appeal, the Nevada Supreme Court reversed, concluding that "[a]lthough states are precluded by federal law from treating disability benefits as community property, states are not precluded from applying state contract law, even when disability benefits are involved." App. 10a. In reaching this result, the Nevada Supreme Court explicitly rejected the argument that when Mr. Shelton elected to receive full disability pay in lieu of retired pay that, this Court's decision in *Mansell* required that any amounts so waived would not be subject to division with his former spouse. App. 5a.

The Nevada Supreme Court thus held, relying on a variety of state supreme court and state appellate decisions:

> Based on the cases decided after *Mansell*, we do not agree [that *Mansell* dictates a result in favor of Mr. Shelton].
>
> Many courts have determined that a recipient of military disability payments may not deprive a former spouse of marital property. The courts proceed under various theories, but the underlying theme is that it is unfair for a veteran spouse to unilaterally deprive a former spouse of a community property interest simply by making an election to take disability pay in lieu of retirement pay. Although states cannot divide disability payments as community property, states are not preempted from enforcing orders that are res judicata or from enforcing contracts or from reconsidering divorce decrees, even when disability pay is involved.

App. 5a-6a (citations omitted).

In short, the Nevada Supreme Court ruled that state law principles of contract law, see App. 7a-9a, permit a state court to order the payment of a veteran's disability benefits to a former spouse, despite the statutory provisions of USFSPA and the antiattachment clause of the Veterans' Benefits Act,[3] and this Court's ruling in *Mansell*.

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[3] The effect of 38 U.S.C. § 5301(a), was briefed by the parties and mentioned by the Nevada Supreme Court. See App. 6a n.13.

REASONS FOR GRANTING THE PETITION

STATE COURTS ARE SHARPLY DIVIDED AS TO THE PROPER TREATMENT OF VETERANS' DISABILITY PAY IN DIVORCE PROPERTY SETTLEMENTS

This Petition calls for the Court to reconsider the nettlesome connection between federal statutes governing the disposition of federal veterans' benefits and the traditional authority of state courts over the making and enforcement of property settlements arising from divorce. This issue has required the Court's attention on a number of occasions in the last quarter-century, see, e.g., *Hisquierdo v. Hisquierdo*, 439 U.S. 572 (1979), *McCarty v. McCarty*, 453 U.S. 210 (1981); *Rose v. Rose*, 481 U.S. 619 (1987); and *Mansell v. Mansell*, 490 U.S. 581 (1989).

It requires this Court's review now because state supreme courts and appellate courts are in manifest division as to the proper construction of the relevant federal statutes involved here – the Uniformed Services Former Spouses' Protection Act (USFSPA), 10 U.S.C. § 1408; App. 15a, and the nonattachment provision of the Veterans' Benefits Act (VBA), 38 U.S.C. § 5301; App. 24a. In addition, state courts – including the Nevada Supreme Court in the decision for which review is sought here; see App. 5a-6a – are clearly unsettled as to the preemptive effect that federal benefits statutes should have on the contractual enforcement of state law divorce property settlements. Finally, many state courts appear to be either in open defiance of this Court's earlier ruling in *Mansell*, or (at a minimum) striving mightily to develop untenable and problematic ways to distinguish this Court's holding that USFSPA preempts state

laws that have the effect of devolving on a former spouse funds that are attributable to a veteran's receipt of disability pay. See 490 U.S. at 583, 594-95

1. There are a number of lines of fracture in state court decisions dealing with the proper application of federal veterans' benefits statutes in enforcement of divorce property settlements.

a. One set of these divisions are frankly noted by the Nevada Supreme Court, App. 5a-6a, insofar as it observed that many state courts have held, notwithstanding *Mansell*, "that a recipient of military disability payments may not deprive a former spouse of marital property. The courts proceed under various theories, but the underlying theme is that it is unfair for a veteran spouse to unilaterally deprive a former spouse of a community property interest simply by making an election to take disability pay in lieu of retirement pay." Id. (citing *In re Marriage of Mansell*, 265 Cal. Rptr. 227 (Cal. App. 1989), cert. denied, 498 U.S. 806 (1990); *Ford v. Ford*, 783 S.W.2d 879 (Ark. App. 1990); *McHugh v. McHugh*, 861 P.2d 113 (Idaho 1993); *Adams v. Adams*, 725 A.2d 824 (Pa.1999); *Trahan v. Trahan*, 894 S.W.2d 113 (Tex. App.1995); *Owen v. Owen*, 419 S.E.2d 267 (Va. App. 1992); *In re Marriage of Jennings*, 980 P.2d 1248 (Wash. 1999)). Employing these same precedents from other jurisdictions, the Nevada Supreme Court concluded that "states are not preempted from enforcing orders that are res judicata or from enforcing contracts or from reconsidering divorce decrees, even when disability pay is involved." Id.

b. Another set of state court decisions have specifically confronted this Court's ruling in *Mansell* and sought to limit or distinguish it. Some courts have sought to constrain *Mansell* to its facts. After all, Major Mansell was already receiving disability benefits at the time of the dissolution of his

marriage; any attempt to divide disability pay as a marital asset would clearly violate USFSPA. See 490 U.S. at 585. But, according to some state courts, *Mansell*'s facts did not ostensibly speak to the situation where a veteran later decides to forego additional retirement pay in favor of disability pay. Some state courts have seized on this factual nuance as the basis of authority to quantify with certainty the former spouse's interest in a veteran's retired pay, which the former service member is not permitted to frustrate by subsequently voluntarily waiving retired pay.[4] See *Hisgen v. Hisgen*, 554 N.W.2d 494, 497-98 (S.D. 1996); *Abernethy v. Fishkin*, 699 So. 2d 235, 239-40 (Fla. 1997); *In re Marriage of Gaddis*, 957 P.2d 1010, 1013 (Ariz. App. 1997); *In re Marriage of Harris*, 991 P.2d 262, 266 (Ariz. App. 1999); *Johnson v. Johnson*, 37 S.W.3d 892, 896-97 (Tenn. 2001). This may well characterize the approach of the Nevada Supreme Court here, given its construction of the divorce property settlement between the parties. See App. 8a-9a; see also App. 13a-14a.

In other cases, state courts have enforced divorce decrees or property settlements which provided that the military spouse could take no action to diminish his or her retired pay, and would indemnify the non-military spouse for any such

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[4] Other state courts have noted that *Mansell* was decided in he context of a community property state and that its ruling should not affect a state court's decision to award alimony out of a veteran's disability pay. See, e.g., *Steiner v. Steiner*, 788 So. 2d 771, 778 (Miss. 2001); *Riley v. Riley*, 571 A.2d 1261, 1265 (Md. Ct. Spec. App. 1990); *Weberg v. Weberg*, 463 N.W.2d 382, 384 (Wis. App. 1990). Since Petitioner and Respondent mutually disclaimed alimony or spousal support in their divorce decree, see Pet. App. 14a, this issue is not raised here.

diminution.[5] See *Abernethy*, 699 So.2d at 239-40; *Owen*, 419 S.E.2d at 269-71. Some courts have taken the same approach even without an express indemnity agreement. See *McHugh*, 861 P.2d at 115. Still other state courts have held that the waiver of retirement pay with a reduction in pension payments to the non-military spouse was a change in circumstances, which permitted redistribution of marital property or reassessment of support payments. See *In re Marriage of Jennings*, 980 P.2d at 1254-55; *Kramer v. Kramer*, 567 N.W.2d 100, 113 (Neb. 1997); *Clauson v. Clauson*, 831 P.2d 1257, 1261-64 (Alaska 1992). Yet other courts have held that if the military retiree waives retired pay to receive disability benefits, the state courts have the equitable power to impose a resulting trust on the money received as disability payments. See *Krapf v. Krapf*, 786 N.E.2d 318, 326 (Mass. 2003); *In re Marriage of Krempin*, 83 Cal.Rptr.2d 134, 143 (Cal. App. 1999).

While these state courts have taken slightly different approaches, each achieved a doctrinal end-run around *Mansell*. The common thread in these and other similar cases is the central concept that the nonmilitary former spouse has an inchoate interest in the military retiree's retired pay that can be fixed at the time of divorce, which the retiree should not and will not be permitted to affect. Where the veteran seeks to elect the receipt of disability pay, these state courts have ruled that, notwithstanding *Mansell*, they are at liberty to modify divorce property settlements to require the effective transfer of a portion of a veteran's disability benefits to a former spouse.

c. But the courts in other jurisdictions have been more respectful of this Court's rulings, resisting the temptation

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[5] No such indemnification clause appears in the divorce decree in this case. See App. 13a-14a.

to limit or distinguish *Mansell* to the vanishing point, and to blithely override the preemptive effect of USFSPA. In *Ex parte Billieck*, 777 So. 2d 105 (Ala. 2000), the Alabama Supreme Court held that USFSPA's definition of disposable retired pay, 10 U.S.C. § 1408(a)(4); App. 17a, and this Court's ruling in *Mansell*, ineluctably led to the conclusion that state courts could not modify a divorce property settlement by requiring a veteran to remit disability pay to a former spouse, even where the veteran had agreed (at the time of divorce) to pay a certain percentage of retirement pay which was later foregone in favor of disability pay. See id. at 106-09. See also *Ashley v. Ashley*, 990 S.W.2d 507, 508-09 (Ark. 1999) (to the same effect).

Kansas courts have reached substantially the same conclusion. In *Matter of the Marriage of Pierce*, 982 P.2d 995 (Kan. App. 1999), the Kansas Court of Appeals ruled that

> *Mansell* makes it perfectly clear that the state trial courts have no jurisdiction over disability benefits received by a veteran. The trial court in this case cannot order Douglas to change the payments back to retirement benefits, and it cannot order him to pay his disability benefits to Priscilla. We conclude the court may not do indirectly what it cannot do directly.

Id. at 998. In a subsequent decision, the Kansas Supreme Court adopted this approach, although ruling that how to characterize a particular veteran's benefits as either retired pay or disability pay, within the meaning of USFSPA's exclusion clause, 10 U.S.C. § 1408(a)(4)(c), App. 17a, was sometimes a difficult factual matter. See *Matter of the Marriage of Wherrell*, 58 P.3d 734, 737-41 (Kan. 2002).

Other state intermediate appeals courts have likewise held that the proper interpretation of USFSPA, as construed by *Mansell*, is that divorce decrees cannot be modified in order to

transfer a veteran's disability benefits to a former spouse, even where a service member had agree to share a portion of retirement pay that was later waived to receive disability pay. See *Hapney v. Hapney*, 824 S.W.2d 408 (Ark. App. 1992); *Wright v. Wright*, 594 So. 2d 1139, 1140 (La. App. 1992); *Matter of the Marriage of Reinauer*, 946 S.W.2d 853, 858-59 (Tex. App. 1997); *Keough v. Keough*, 1997 WL 242559 (Va. App. May 13, 1997).

2. a. This widely disparate treatment of disability pay in modifications sought to divorce property settlements involving waived retired pay has not gone unnoticed by the federal agencies charged respectively with the disbursement of veterans' retired pay and of disability pay, the Departments of Defense and Veterans Affairs, respectively. In the September 2001 Report prepared by the Department of Defense, at the request of Congress in section 643 of the National Defense Authorization Act, FY 1998, Pub. L. 105-85, 111 Stat. 1629 (1997), it was noted that

> Congress has, on several occasions, chosen to give VA disability compensation a higher priority than payments to former spouses. This is consistent with the treatment historically provided by Congress to VA disability compensation. It has treated it as compensation owed to the member for injuries/wounds incurred in the service of the United States. As such, the Congress has always exempted it from the claims of creditors (it has allowed claims for spousal and child support).

DoD 2001 USFSPA Report, supra note 2, at 3, 81-82. The Department of Defense observed that state courts had given widely variant treatment to disability pay when enforcing an earlier divorce property settlement that involved waived retired pay, see id. at 52-54 (citing an American Bar Association's

April 13, 1999, responses to DoD's inquiries, at 11-12, found at http://www.abanet.org/family/military/nda98.html (last visited Jan. 18, 2004)), and that this would either have to be addressed by Congress or this Court. In any event, the Department of Defense turned aside suggestions that it should institute regulations that would allow the payment of veterans' disability pay to former spouses. It found that this would be a clear contravention of USFSPA, and such a radical change in the law would have to be a matter addressed, in the first instance, by the Veterans Administration, or by Congress. See id. at 82.

Likewise, the Veterans Administration has indicated that, pursuant to this Court's decision in *Rose v. Rose*, 481 U.S. 619 (1987) (allowing state courts to set child support obligations at levels that veterans would necessarily have to use disability pay to satisfy them), it will allow a garnishment of disability compensation received in lieu of retirement pay to satisfy court-ordered child support, consistent with the nonattachment provision of the Veterans' Benefits Act, 38 U.S.C. § 5301(a). See Statement of John Thompson, Acting General Counsel, Department of Veterans' Affairs, House Committee on Veterans' Affairs, Aug. 5, 1998, *Garnishment of Veterans Affairs Benefits*, available at http://www.va.gov/OCA/testimony/5AG98AGC_usa.htm (visited Jan. 18, 2004)). Somewhat more controversial was the application of such garnishment for the satisfaction of alimony or spousal support orders, but the VA has apparently been permitting such. See id. The Veterans Administration will not, however, permit the attachment of disability pay as part of a divorce property settlement. See id.

According to these pronouncements by the relevant federal agencies, it seems clear that the root cause of the widely discordant treatment of veterans' disability pay in state divorce property modification proceedings is not any lack of guidance

by the relevant federal statutes on point – USFSPA and the antiattachment provision of the VBA – but, rather, the failure of state courts to give the proper preemptive effect to these laws. That such confusion should persist even after this Court's decision in *Mansell*, with its express holding that USFSPA's treatment of disability pay preempts contrary state law even under the most stringent preemption standards, see 490 U.S. at 587, is deeply troubling and requires this Court's attention.

b. Petitioner needs hardly speculate as to the number of individuals who are potentially affected by this trend in the case law. According to the DoD 2001 USFSPA Report, supra note 1, at 19, as of April 1, 1999, 1.985 million former service members are receiving retired pay. Assuming even moderate divorce rates and a robust cohort of veterans (a large percentage of which may not have yet been rated for disability), that leaves a large pool of male and female veterans who may find themselves in the situation presented in this case. Indeed, the 2 million figure surely undercounts the potential class of litigants here, insofar as it excludes those still in the service (and thus not drawing retired or disability pay), even though they may already be divorced and subject to a divorce decree with a property settlement which stipulates as to a future division of retired pay.

3. Even if state courts were unanimous in their holdings that USFSPA does not preempt state contractual enforcement of divorce property settlements involving the division of retired pay later supplanted by disability pay, Petitioner would still refer this issue to the Court's attention in light of its previous ruling in *Mansell*. But state courts have by no means reached such a consensus, and, indeed, as indicated above, have sharply split as to whether such modification proceedings are permissible, and, even if so, under what legal theories they may proceed. The split in state court jurisprudence has not narrowed over time; it

has continued to grow.

Likewise, Petitioner believes this is a suitable case for the Court to accept to resolve this matter. The relevant provisions of the divorce decree between the parties, App. 13a-14a, are standard. There was no indemnification provision by which a veteran undertakes to compensate a former spouse in the event the veteran seeks to elect disability pay in lieu of retired pay. As even acknowledged by the Nevada Supreme Court, see App. 8a, the Petitioner did not purport in the divorce decree to allocate any part of his existing disability pay to the Respondent. Finally, this case does not involve a modification of alimony payments, as both parties to the divorce decree disclaimed any spousal support. See App. 14a. Simply presented here is the question of whether a state court can, under any legal theory, and consistent with federal law and this Court's ruling in *Mansell*, require a veteran to remit a portion of disability pay in compensation for waived retired pay.

4. a. Without unnecessarily broaching the merits of this issue, Petitioner would merely remark at this stage that this question is settled by the same sensible construction of USFSPA made already by this Court in *Mansell*. Congress has already spoken to the definition of "disposable retired pay" subject to division under USFSPA, 10 U.S.C. § 1408(a)(4)(B); App. 17a, by expressly excluding disability pay from such calculations. Likewise, the savings clause that Congress provided in USFSPA as grounds for state courts to exceed the statutory caps on the automatic remission of retired pay to former spouses, 10 U.S.C. § 1408(e)(6); App. 22a, does not give state courts carte blanche to treat disability pay as retired pay. See *Mansell*, 490 U.S. at 588-90. The relevant provisions of USFSPA have not changed since this Court's decision in *Mansell*. It would stretch the canons of statutory construction too far to suggest, as the court below appears to, see App. 6a, that what was found preempted

under one statutory scheme is not later to be regarded as preempted under the same scheme.

Nor can it seriously be entertained that state courts' reliance – as in the Nevada Supreme Court decision here, see App. 6a-8a (citing *Poullard v. Poullard*, 780 So. 2d 498, 499-500 (La. App. 2001)) – on principles of state contract law to enforce divorce decrees can prevail over a preemptive federal interest. See *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 223-23 (1986) ("'Contracts, however express, cannot fetter the constitutional authority of Congress. Contracts may create rights of property, but when contracts deal with a subject matter which lies within the control of Congress, they have a congenital infirmity. Parties cannot remove their transactions from the reach of dominant constitutional power by making contracts about them.' If the regulatory statute is otherwise within the powers of Congress, therefor, its application may not be defeated by private contractual provisions.") (quoting *Norman v. Baltimore & Ohio R. Co.*, 294 U.S. 240, 307-308 (1935)).

b. The Nevada Supreme Court's supposition that "'nothing in either the state or federal law prevents a person from agreeing to give a part of his disability payment to another'," App. 7a (quoting *Poullard*, 780 So. 2d at 499-500), is manifestly contradicted by the relevant provisions of the Veterans' Benefits Act, 38 U.S.C. § 5301, which provides that "[p]ayments of benefits due or to become due under any law administered by the Secretary [of Veterans Affairs] shall not be assignable except to the extent specifically authorized by law, and such payments made to, or on account of, a beneficiary shall be . . . exempt from the claim of creditors, and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary." Id. § 5301(a)(1). And, if this was not enough,

Congress has recently amended the VBA and this applicable provision, to

> clarify that, in any case where a beneficiary entitled to compensation, pension, or dependency and indemnity compensation enters into an agreement with another person under which agreement such other person acquires for consideration the right to receive such benefit by payment of such compensation, pension or dependency and indemnity compensation, as the case may be. . . such agreement shall be deemed to be an assignment and is prohibited.

Veterans Benefits Act of 2003, Pub. L. No. 108-183, § 702, 117 Stat. 2651, Dec. 16, 2003, to be codified at § 5301(a)(3)(A).

Petitioner would thus submit that, in addition to the issues raised under USFSPA, this case is an appropriate vehicle for the Court to revisit the proper construction of the VBA. And while the Nevada Supreme Court was clearly cognizant of the VBA, see App. 6a n.13, it chose to ignore it in its ruling that no federal statute prevents a contractual assignment of veterans' disability pay. Petitioner is mindful that the VBA issue may well turn on this Court's earlier decisions in *Rose*, 481 U.S. at 630-33 (allowing attachment of disability pay to satisfy child support obligations), and *Ridgway v. Ridgway*, 454 U.S. 46 (1981) (rejecting state court's disposition of a veterans' life insurance policy benefits as either marital property or a constructive trust). And although the logic of the *Rose* decision on the VBA's antiattachment clause drew but a bare majority of this Court's members (with O'Connor, Stevens and Scalia, JJ. writing or joining concurrences), the holding was narrowly drafted to cover only child support obligations, and appeared to specifically exclude alimony or spousal support payments or any general attempt to characterize veterans' benefits as marital

property divisible upon divorce.

Petitioner would maintain before this Court that it would stretch the VBA's antiattachment provision too far to allow state court modifications of divorce property settlements by transferring disability pay to former spouses. Given the wide array of veterans' benefits (not just disability pay), and the broad range of circumstances in which these can become encumbered with debt or contractual obligations, this Court's guidance may well be necessary to avoid a wholesale erosion of veterans' benefits through a variety of attachment schemes. Just as Congress has made clear in USFSPA that disability pay is not to be treated as a form of retired pay subject to division with former spouses, there is no indication that Congress has intended that disability pay be made available to satisfy the claims of former spouses in divorce property settlements. Cf. *Rose*, 481 U.S. at 631 ("state contempt proceedings to enforce a valid child support order coincide[s] with Congress' intent to provide veterans' disability compensation for the benefit of both appellant and his dependents."). Indeed, if anything, Congress appears to be as concerned as ever in strengthening the VBA's antiattachment provision to cover the circumstances raised in this case. See Veterans Benefits Act of 2003, Pub. L. No. 108-183, § 702, 117 Stat. 2651, Dec. 16, 2003, to be codified at § 5301(a)(3)(A).

c. This case presents an opportunity for the Court to not only clarify the relevant standards of preemption that apply where federal veterans' benefits protections apparently conflict with state divorce property settlement standards, but also to conclusively settle the effect of USFSPA and VBA where state courts purport to award disability pay in the guise of enforcing earlier divorce decrees granting portions of retired pay. Additionally, this Court can delimit the precise scope of its earlier ruling in *Mansell*, and either announce to

state courts that they must faithfully adhere to it or are free to continue experimenting in limiting and distinguishing that holding. Lastly, and not to be discounted, this Court would have the opportunity to declare a coherent and consistent rule of construction for USFSPA and VBA in cases involving the disposition of disability pay, potentially affecting tens of thousands of veterans and their former spouses attempting to manage their respective financial affairs.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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January 23, 2004

Supreme Court of Nevada

Maryann C. SHELTON, n/k/a Maryann C. Mitchell, Appellant,
v.
Roland A. SHELTON, Respondent.

No. 37483.

Oct. 29, 2003.

Before AGOSTI, C.J., SHEARING and BECKER, JJ.

OPINION

SHEARING, J.

The principal issue in this appeal is whether relief is available to a former spouse when a veteran unilaterally waives his military pension in order to receive disability benefits, resulting in the former spouse's loss of her community share in the pension. We conclude that, although courts are prohibited by federal law from determining veterans' disability pay to be community property, state law of contracts is not preempted by federal law. Thus, respondent must satisfy his contractual obligations to his former spouse, and the district court erred in denying former spouse's motion solely on the basis that federal law does not permit disability pay to be divided as community property.

FACTS

Respondent Roland Shelton and appellant Maryann Shelton were married on September 6, 1980, in San Diego, California. Roland served in the United States Navy for more than ten years during the marriage. On January 17, 1997, the Sheltons jointly petitioned for a summary decree of divorce in Clark County District Court. On January 29, 1997, the district court entered a decree of divorce incorporating the parties' joint petition.

Under the terms of the agreement, the parties designated both Roland's military retirement pay and military disability pay as community property, although the agreement awarded all of the disability pay to Roland. The parties, who negotiated the terms without the aid of counsel, agreed that Roland, individually, would be allotted "half of [his] military retirement pay in the amount of $500 and military disability pay in the amount of $174." Maryann would be allotted the other "half of HUSBAND'S military retirement pay in the amount of $577, until her demise."[1] At the time of the divorce, Roland had an outstanding military pension of $1,000 per month, and a disability payment of $174 per month based upon a determination that he was ten percent disabled. Both Roland and Maryann waived any right to spousal support; however, Maryann remained as beneficiary under Roland's military retirement insurance.

Beginning in January 1997, Roland regularly made his required payments to Maryann. In 1999, the Department of

[1] Despite the purported equal division, the numerical disparity between the respective portions of military retirement pay was never addressed.

Veterans Affairs reevaluated Roland's disability status and concluded that Roland was 100 percent disabled, effective May 1, 1998. Roland elected to waive all his military retirement benefits for an equivalent amount of tax-exempt disability pay as federal law allows.[2] Upon receiving notice of an increased disability rating on February 26, 1999, Roland ceased his payments to Maryann.

Thereafter, Maryann moved the district court for an order enforcing the decree of divorce. Maryann asked for half of Roland's military pension, or $577, as had been agreed upon before the divorce and as was incorporated in the divorce decree. Roland opposed Maryann's motion on the grounds that the divorce decree did not allocate disability pay to Maryann, and that federal law prohibited community property division of veterans' disability benefits. The district court denied Maryann's motion on the basis of the United States Supreme Court's decision in *Mansell v. Mansell* (*Mansell I*),[3] despite repeatedly stating how unfair the result was to Maryann. In *Mansell I,* the Supreme Court held that federal law prevents states from treating military disability pay as divisible community property.[4] The district court also refused to grant Maryann equitable relief for the loss of her $577 monthly income on the basis that it lacked jurisdiction to hear a request for alimony when alimony had been waived in the final divorce decree.

[2] 38 U.S.C. § 5305 (2000).

[3] 490 U.S. 581, 109 S.Ct. 2023, 104 L.Ed.2d 675 (1989).

[4] *Id.* at 594-95, 109 S.Ct. 2023.

DISCUSSION

Domestic relations are generally within the purview of state courts.[5] However, in *McCarty v. McCarty,* a 1981 decision, the United States Supreme Court construed federal statutes to prevent state courts from treating military retirement pay as community property.[6] The United States Supreme Court reasoned that federal preemption was necessary as the federal government was interested in maintaining military retirement schemes as an inducement for enlistment and reenlistment and for effective military personnel management.[7] In response to the broad preemption ruling in *McCarty,* Congress enacted the Uniformed Services Former Spouses' Protection Act (USFSPA) in 1982.[8] The USFSPA authorizes state courts to divide "disposable retired pay" among spouses in accordance with community property law.[9] Although the USFSPA clearly

[5] *Hisquierdo v. Hisquierdo,* 439 U.S. 572, 581, 99 S.Ct. 802, 59 L.Ed.2d 1 (1979).

[6] 453 U.S. 210, 232-35, 101 S.Ct. 2728, 69 L.Ed.2d 589 (1981); *see also Mansell I,* 490 U.S. at 584, 109 S.Ct. 2023 (discussing *McCarty*).

[7] *McCarty,* 453 U.S. at 213, 234, 101 S.Ct. 2728.

[8] Pub.L. No. 97-252, 96 Stat. 730 (codified as amended at 10 U.S.C. § 1408). The parties refer to the 1982 version of the statute; however, the relevant parts of the statute have not changed since 1982.

[9] 10 U.S.C. § 1408(c)(1) (2000). Disposable retired pay refers to monthly retired pay minus statutory exceptions. *Id.* §

(continued...)

subjected military retirement pay to community property laws, it did not clearly address whether disability benefits were also subject to state community property or equitable distribution laws.

Subsequently, in *Mansell I,* the Supreme Court considered whether state courts may treat veterans' disability benefits as community property. The Court initially noted that "[i]n order to prevent double dipping, a military retiree may receive disability benefits only to the extent that he waives a corresponding amount of his military retirement pay."[10] The Court then held that under USFSPA's "plain and precise language, state courts have been granted the authority to treat disposable retired pay as community property; they have not been granted the authority to treat total retired pay [which includes disability pay] as community property."[11] Because Roland elected to receive full disability pay in lieu of his retirement pay, he argues that *Mansell I* prevents any payments to Maryann, thus depriving her of her community property interest in Roland's pension. Based on the cases decided after *Mansell I,* we do not agree.

Many courts have determined that a recipient of military disability payments may not deprive a former spouse of marital

[9](...continued)
1408(a)(4).

[10] *Mansell I,* 490 U.S. at 583, 109 S.Ct. 2023; *see also* 38 U.S.C. § 5305 (2000) (previously codified at 38 U.S.C. § 3105 (1988)).

[11] 490 U.S. at 589, 109 S.Ct. 2023.

property.[12] The courts proceed under various theories, but the underlying theme is that it is unfair for a veteran spouse to unilaterally deprive a former spouse of a community property interest simply by making an election to take disability pay in lieu of retirement pay.[13] Although states cannot divide disability payments as community property, states are not preempted from enforcing orders that are res judicata[14] or from enforcing contracts[15] or from reconsidering divorce decrees,[16] even when disability pay is involved.

In *Poullard v. Poullard,* the Louisiana Court of Appeal held that the husband had stipulated to give his former wife one

[12] *In re Marriage of Mansell,* 217 Cal.App.3d 219, 265 Cal.Rptr. 227 (Ct.App.1989) (*Mansell II*), *cert. denied,* 498 U.S. 806, 111 S.Ct. 237, 112 L.Ed.2d 197 (1990); *Ford v. Ford,* 30 Ark.App. 147, 783 S.W.2d 879 (1990); *McHugh v. McHugh,* 124 Idaho 543, 861 P.2d 113 (1993); *Adams v. Adams,* 725 A.2d 824 (Pa.1999); *Trahan v. Trahan,* 894 S.W.2d 113 (Tex.App.1995); *Owen v. Owen,* 14 Va.App. 623, 419 S.E.2d 267 (1992); *In re Marriage of Jennings,* 138 Wash.2d 612, 980 P.2d 1248 (1999).

[13] Virtually any military retiree eligible for disability will elect to receive disability pay rather than retirement pay since disability pay is not subject to federal, state and local taxation, and thus increases the recipient's after-tax income. 38 U.S.C. § 5301(a) (2000) (previously codified at 38 U.S.C. § 3101(a) (1988)); *Mansell I,* 490 U.S. at 583-84, 109 S.Ct. 2023.

[14] *Mansell II,* 265 Cal.Rptr. at 227; *Ford,* 783 S.W.2d at 879; *Trahan,* 894 S.W.2d at 113.

[15] *Adams,* 725 A.2d at 824; *McHugh,* 861 P.2d at 113; *Owen,* 419 S.E.2d at 267.

[16] *Marriage of Jennings,* 980 P.2d at 1248.

half of his retirement pay in consideration of her alimony waiver.[17] The court held that "[n]othing in either the state or federal law prevents a person from agreeing to give a part of his disability benefit to another.... [T]he redesignation of pay cannot defeat the prior agreement of the parties."[18]

In *Hisgen v. Hisgen,* the Supreme Court of South Dakota enforced a property settlement agreement, stating:

> That case [*Mansell I*], however, does not preclude state courts from interpreting divorce settlements to allow a spouse to receive property or money equivalent to half a veteran's retirement entitlement. "[T]he source of the payments need not come from his exempt disability pay; the husband is free to satisfy his obligations to his former wife by using other available assets."[19]

The question of the interpretation of a contract when the facts are not in dispute is a question of law.[20] "A contract is ambiguous if it is reasonably susceptible to more than one interpretation."[21] The best approach for interpreting an

[17] 780 So.2d 498, 499-500 (La.Ct.App.2001).

[18] *Id.* at 500 (internal quotation marks omitted).

[19] 554 N.W.2d 494, 498 (S.D.1996) (quoting *Holmes v. Holmes,* 7 Va.App. 472, 375 S.E.2d 387, 395 (1988)).

[20] *Grand Hotel Gift Shop v. Granite St. Ins.,* 108 Nev. 811, 815, 839 P.2d 599, 602 (1992).

[21] *Margrave v. Dermody Properties,* 110 Nev. 824, 827, 878

(continued...)

ambiguous contract is to delve beyond its express terms and "examine the circumstances surrounding the parties' agreement in order to determine the true mutual intentions of the parties."[22] This examination includes not only the circumstances surrounding the contract's execution, but also subsequent acts and declarations of the parties.[23] Also, a specific provision will qualify the meaning of a general provision.[24] Finally, "[a]n interpretation which results in a fair and reasonable contract is preferable to one that results in a harsh and unreasonable contract."[25]

The property settlement agreement between Roland and Maryann is ambiguous. The agreement states that Roland's military disability is community property, but it awards the entire amount to Roland. The award of military retirement pay to Maryann describes the award as "[o]ne half of HUSBAND'S military retirement in the amount of $577, until her demise," but the amount designated is more than one-half the amount of Roland's retirement pay at the time. Roland paid Maryann $577

[21](...continued)
P.2d 291, 293 (1994); *see also Pressler v. City of Reno,* 118 Nev. ----, ----, 50 P.3d 1096, 1098 (2002).

[22] *Hilton Hotels v. Butch Lewis Productions,* 107 Nev. 226, 231, 808 P.2d 919, 921 (1991).

[23] *See Trans Western Leasing v. Corrao Constr. Co.,* 98 Nev. 445, 447, 652 P.2d 1181, 1183 (1982).

[24] *See Mayer v. Pierce County Medical Bureau,* 80 Wash.App. 416, 909 P.2d 1323, 1327 (1995).

[25] *Dickenson v. State, Dep't of Wildlife,* 110 Nev. 934, 937, 877 P.2d 1059, 1061 (1994).

until the time he elected to take disability pay in lieu of retirement pay.

It appears, therefore, that the agreement of the parties was that Roland pay Maryann $577 each month for her portion of the community asset, rather than pay her one-half of his retirement pay, since $577 is more specific than "one-half." Moreover, the parties' subsequent conduct reinforces this conclusion, in that Roland ratified the terms of the agreement by performing his obligations under the decree for a period of two years.[26] In addition, this interpretation yields a fair and reasonable result, as opposed to a harsh and unfair result. Roland cannot escape his contractual obligation by voluntarily choosing to forfeit his retirement pay.[27] It appears that Roland possesses ample other assets from which to pay his obligation without even touching his disability pay. Even if he lacks these assets, nothing prevents him from using his disability payments to satisfy his contractual obligation.[28]

[26] *Hoskins v. Skojec,* 265 A.D.2d 706, 696 N.Y.S.2d 303, 304 (1999).

[27] *Dexter v. Dexter,* 105 Md.App. 678, 661 A.2d 171, 174-75 (1995) (holding that under Maryland contract law, "the pensioned party may not hinder the ability of the party's spouse to receive the payments she has bargained for, by voluntarily ... waiving ... the pension benefits"); *Johnson v. Johnson,* 37 S.W.3d 892, 897 (Tenn.2001) (holding that the spouse's "vested interest cannot thereafter be unilaterally diminished by an act of the military spouse," and that the trial court must enforce the decree to provide the spouse with guaranteed monthly payment).

[28] *Poullard,* 780 So.2d at 500 (holding that "[n]othing in either state or federal law prevents a person from agreeing to give part

(continued...)

CONCLUSION

Although states are precluded by federal law from treating disability benefits as community property, states are not precluded from applying state contract law, even when disability benefits are involved. The district court's order is reversed and this matter is remanded to the district court for further proceedings consistent with this opinion.

We concur: AGOSTI, C.J. and BECKER, J.

[28](...continued)
of his disability benefit to another").

FILED
Jan[uary] 31, 2001

DISTRICT COURT
Clark County, Nevada

In the Matter of the Joint Petition of
Roland A. Shelton and Maryann C. Shelton

Roland A. SHELTON, Plaintiff
v.
Maryann C. SHELTON, Defendant,

Case No.: D208942
Dept. No.: F

ORDER

The above-entitled action having come on for hearing on January 24, 2001, Plaintiff present and represented by Glenn Schepps, Esq., of the Leavitt Law Firm, Defendant present and represented by her attorneys, the Law Offices of Amesbury and Schutt, the Court having reviewed all papers and pleadings on file, having heard and considered argument of counsel, and otherwise being fully advised in the premises finds as follows:

IT IS HEREBY ORDERED that Defendant's Motion for Order to Show Cause Why Plaintiff Should Not be Held in Contempt is hereby denied.

IT IS FURTHER ORDERED that Defendant's Motion to Enforce Decree of Divorce is hereby denied.

IT IS FURTHER ORDERED that Defendant's Motion to Reduce Arrears to Judgment is hereby denied.

IT IS FURTHER ORDERED that Defendant's Motion for Attorney's Fees and Costs is hereby denied.

IT IS FURTHER ORDERED that Plaintiff's Countermotion for Attorney's Fees is hereby denied.

IT IS FURTHER ORDERED that pursuant to federal law, Defendant is not entitled to any portion of Plaintiff's veteran's disability as such is not considered a community asset divisible by this Court.

IT IS FURTHER ORDERED that Defendant's request for alimony is hereby denied due to the fact that this Court does not have jurisdiction over that issue.

ENTERED this 30[th] day of January, 2001.

Robert E. Gaston

District Court Judge

FILED
Jan[uary] 29, 1997

DISTRICT COURT
Family Division
Clark County, Nevada

In the Matter of the Joint Petition of
Roland A. Shelton and Maryann C. Shelton,
Co-Petitioners

Case No.: D208942
Dept. No.: B

DECREE OF DIVORCE

This cause coming on without hearing, the Petitioners not appearing, but having filed their Joint Petition for Summary Divorce, the Court having before it all the files, pleadings and papers in the action, and being fully advised in the premises, and fully satisfied that the action has been duly and regularly commenced finds:

* * * *

That the Petitioners have certain community property and have agreed to divide it as follows:

A. To Co-Petitioner ROLAND A. SHELTON:

* * * *

14. One half of military retirement pay in the amount of $500 and military disability pay in the amount of $174.

B. To Co-Petitioner MARYANN C. SHELTON:

* * * *

10. One half of HUSBAND's military retirement in the amount of $577, until her demise.

* * * *

That both Petitioners waived any right to spousal support, but Co-Petitioner ROLAND A. SHELTON has agreed to leave Co-Petitioner, MARYANN C. SHELTON, as beneficiary on Military Retirement Insurance.

* * * *

DONE AND ORDERED, this 24th day of January, 1997.

/s/
District Judge

UNITED STATES CODE ANNOTATED
TITLE 10. ARMED FORCES
SUBTITLE A – GENERAL MILITARY LAW
PART II--PERSONNEL
CHAPTER 71--COMPUTATION OF RETIRED PAY

§ 1408. Payment of retired or retainer pay in compliance with court orders.

(a) Definitions.--In this section:

(1) The term "court" means--

(A) any court of competent jurisdiction of any State, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands, the Northern Mariana Islands, and the Trust Territory of the Pacific Islands;

(B) any court of the United States (as defined in section 451 of title 28) having competent jurisdiction;

(C) any court of competent jurisdiction of a foreign country with which the United States has an agreement requiring the United States to honor any court order of such country; and

(D) any administrative or judicial tribunal of a State competent to enter orders for support or maintenance (including a State agency administering a program under a State plan approved under part D of title IV of the Social Security Act), and, for purposes of this subparagraph, the term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, and American Samoa.

(2) The term "court order" means a final decree of divorce, dissolution, annulment, or legal separation issued by a court, or a court ordered, ratified, or approved property settlement incident to such a decree (including a final decree modifying the terms of a previously issued decree of divorce, dissolution, annulment, or legal separation, or a court ordered, ratified, or approved property settlement incident to such previously issued decree), or a support order, as defined in section 453(p) of the Social Security Act (42 U.S.C. 653(p)), which--

(A) is issued in accordance with the laws of the jurisdiction of that court;

(B) provides for--

(i) payment of child support (as defined in section 459(i)(2) of the Social Security Act (42 U.S.C. 659(i)(2)));

(ii) payment of alimony (as defined in section 459(i)(3) of the Social Security Act (42 U.S.C. 659(i)(3))); or

(iii) division of property (including a division of community property); and

(C) in the case of a division of property, specifically provides for the payment of an amount, expressed in dollars or as a percentage of disposable retired pay, from the disposable retired pay of a member to the spouse or former spouse of that member.

(3) The term "final decree" means a decree from which no appeal may be taken or from which no appeal has been taken within the time allowed for taking such appeals under the laws applicable to such appeals, or a decree from which timely appeal has been taken and such appeal has been finally decided

under the laws applicable to such appeals.

(4) The term "disposable retired pay" means the total monthly retired pay to which a member is entitled less amounts which--

(A) are owed by that member to the United States for previous overpayments of retired pay and for recoupments required by law resulting from entitlement to retired pay;

(B) are deducted from the retired pay of such member as a result of forfeitures of retired pay ordered by a court-marital or as a result of a waiver of retired pay required by law in order to receive compensation under title 5 or title 38;

(C) in the case of a member entitled to retired pay under chapter 61 of this title, are equal to the amount of retired pay of the member under that chapter computed using the percentage of the member's disability on the date when the member was retired (or the date on which the member's name was placed on the temporary disability retired list); or

(D) are deducted because of an election under chapter 73 of this title to provide an annuity to a spouse or former spouse to whom payment of a portion of such member's retired pay is being made pursuant to a court order under this section.

(5) The term "member" includes a former member entitled to retired pay under section 12731 of this title.

(6) The term "spouse or former spouse" means the husband or wife, or former husband or wife, respectively, of a member who, on or before the date of a court order, was married to that member.

(7) The term "retired pay" includes retainer pay.

* * * *

(c) Authority for court to treat retired pay as property of the member and spouse.--(1) Subject to the limitations of this section, a court may treat disposable retired pay payable to a member for pay periods beginning after June 25, 1981, either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court. A court may not treat retired pay as property in any proceeding to divide or partition any amount of retired pay of a member as the property of the member and the member's spouse or former spouse if a final decree of divorce, dissolution, annulment, or legal separation (including a court ordered, ratified, or approved property settlement incident to such decree) affecting the member and the member's spouse or former spouse (A) was issued before June 25, 1981, and (B) did not treat (or reserve jurisdiction to treat) any amount of retired pay of the member as property of the member and the member's spouse or former spouse.

(2) Notwithstanding any other provision of law, this section does not create any right, title, or interest which can be sold, assigned, transferred, or otherwise disposed of (including by inheritance) by a spouse or former spouse. Payments by the Secretary concerned under subsection (d) to a spouse or former spouse with respect to a division of retired pay as the property of a member and the member's spouse under this subsection may not be treated as amounts received as retired pay for service in the uniformed services.

(3) This section does not authorize any court to order a member to apply for retirement or retire at a particular time in order to effectuate any payment under this section.

(4) A court may not treat the disposable retired pay of a member in the manner described in paragraph (1) unless the court has jurisdiction over the member by reason of (A) his residence, other than because of military assignment, in the territorial jurisdiction of the court, (B) his domicile in the territorial jurisdiction of the court, or (C) his consent to the jurisdiction of the court.

* * * *

(e) Limitations.--(1) The total amount of the disposable retired pay of a member payable under all court orders pursuant to subsection (c) may not exceed 50 percent of such disposable retired pay.

(2) In the event of effective service of more than one court order which provide for payment to a spouse and one or more former spouses or to more than one former spouse, the disposable retired pay of the member shall be used to satisfy (subject to the limitations of paragraph (1)) such court orders on a first-come, first-served basis. Such court orders shall be satisfied (subject to the limitations of paragraph (1)) out of that amount of disposable retired pay which remains after the satisfaction of all court orders which have been previously served.

(3)(A) In the event of effective service of conflicting court orders under this section which assert to direct that different amounts be paid during a month to the same spouse or former spouse of the same member, the Secretary concerned shall--

(i) pay to that spouse from the member's disposable retired pay the least amount directed to be paid during that month by any such conflicting court order, but not more than the amount of disposable retired pay which remains available for payment of such court orders based on when such court orders were

effectively served and the limitations of paragraph (1) and subparagraph (B) of paragraph (4);

(ii) retain an amount of disposable retired pay that is equal to the lesser of--

(I) the difference between the largest amount required by any conflicting court order to be paid to the spouse or former spouse and the amount payable to the spouse or former spouse under clause (i); and

(II) the amount of disposable retired pay which remains available for payment of any conflicting court order based on when such court order was effectively served and the limitations of paragraph (1) and subparagraph (B) of paragraph (4); and

(iii) pay to that member the amount which is equal to the amount of that member's disposable retired pay (less any amount paid during such month pursuant to legal process served under section 459 of the Social Security Act (42 U.S.C. 659) and any amount paid during such month pursuant to court orders effectively served under this section, other than such conflicting court orders) minus--

(I) the amount of disposable retired pay paid under clause (i); and

(II) the amount of disposable retired pay retained under clause (ii).

(B) The Secretary concerned shall hold the amount retained under clause (ii) of subparagraph (a) until such time as that Secretary is provided with a court order which has been certified by the member and the spouse or former spouse to be

valid and applicable to the retained amount. Upon being provided with such an order, the Secretary shall pay the retained amount in accordance with the order.

(4)(A) In the event of effective service of a court order under this section and the service of legal process pursuant to section 459 of the Social Security Act (42 U.S.C. 659), both of which provide for payments during a month from the same member, satisfaction of such court orders and legal process from the retired pay of the member shall be on a first-come, first-served basis. Such court orders and legal process shall be satisfied out of moneys which are subject to such orders and legal process and which remain available in accordance with the limitations of paragraph (1) and subparagraph (B) of this paragraph during such month after the satisfaction of all court orders or legal process which have been previously served.

(B) Notwithstanding any other provision of law, the total amount of the disposable retired pay of a member payable by the Secretary concerned under all court orders pursuant to this section and all legal processes pursuant to section 459 of the Social Security Act (42 U.S.C. 659) with respect to a member may not exceed 65 percent of the amount of the retired pay payable to such member that is considered under section 462 of the Social Security Act (42 U.S.C. 662) to be remuneration for employment that is payable by the United States.

(5) A court order which itself or because of previously served court orders provides for the payment of an amount which exceeds the amount of disposable retired pay available for payment because of the limit set forth in paragraph (1), or which, because of previously served court orders or legal process previously served under section 459 of the Social Security Act (42 U.S.C. 659), provides for payment of an

amount that exceeds the maximum amount permitted under paragraph (1) or subparagraph (B) of paragraph (4), shall not be considered to be irregular on its face solely for that reason. However, such order shall be considered to be fully satisfied for purposes of this section by the payment to the spouse or former spouse of the maximum amount of disposable retired pay permitted under paragraph (1) and subparagraph (B) of paragraph (4).

(6) Nothing in this section shall be construed to relieve a member of liability for the payment of alimony, child support, or other payments required by a court order on the grounds that payments made out of disposable retired pay under this section have been made in the maximum amount permitted under paragraph (1) or subparagraph (B) of paragraph (4). Any such unsatisfied obligation of a member may be enforced by any means available under law other than the means provided under this section in any case in which the maximum amount permitted under paragraph (1) has been paid and under section 459 of the Social Security Act (42 U.S.C. 659) in any case in which the maximum amount permitted under subparagraph (B) of paragraph (4) has been paid.

{Added Pub.L. 97-252, Title X, § 1002(a), Sept. 8, 1982, 96 Stat. 730, and amended Pub.L. 98-525, Title VI, § 643(a) to (d), Oct. 19, 1984, 98 Stat. 2547; Pub.L. 99-661, Div. A, Title VI, § 644(a), Nov. 14, 1986, 100 Stat. 3887; Pub.L. 100-26, §§ 3(3), 7(h)(1), Apr. 21, 1987, 101 Stat. 273, 282; Pub.L. 101-189, Div. A, Title VI, § 653(a)(5), Title XVI, § 1622(e)(6), Nov. 29, 1989, 103 Stat. 1462, 1605; Pub.L. 101-510, Div. A, Title V, § 555(a) to (d), (f), (g), Nov. 5, 1990, 104 Stat. 1569, 1570; Pub.L. 102-190, Div. A, Title X, § 1061(a)(7), Dec. 5, 1991, 105 Stat. 1472; Pub.L. 102-484, Div. A, Title VI, §

653(a), Oct. 23, 1992, 106 Stat. 2426; Pub.L. 103-160, Div. A, Title V, § 555(a), (b), Title XI, § 1182(a)(2), Nov. 30, 1993, 107 Stat. 1666, 1771; Pub.L. 104-106, Div. A, Title XV, § 1501(c)(16), Feb. 10, 1996, 110 Stat. 499; Pub.L. 104-193, Title III, §§ 362(c), 363(c)(1) to (3), Aug. 22, 1996, 110 Stat. 2246, 2249; Pub.L. 104-201, Div. A, Title VI, § 636, Sept. 23, 1996, 110 Stat. 2579; Pub.L. 105-85, Div. A, Title X, § 1073(a)(24), (25), Nov. 18, 1997, 111 Stat. 1901; Pub.L. 107-107, Div. A, Title X, § 1048(c)(9), Dec. 28, 2001, 115 Stat. 1226.}

UNITED STATES CODE ANNOTATED
TITLE 38. VETERANS' BENEFITS
PART IV--GENERAL ADMINISTRATIVE PROVISIONS
CHAPTER 53--SPECIAL PROVISIONS RELATING TO BENEFITS

§ 5301. Nonassignability and exempt status of benefits.

(a) (1) Payments of benefits due or to become due under any law administered by the Secretary shall not be assignable except to the extent specifically authorized by law, and such payments made to, or on account of, a beneficiary shall be exempt from taxation, shall be exempt from the claim of creditors, and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary. The preceding sentence shall not apply to claims of the United States arising under such laws nor shall the exemption therein contained as to taxation extend to any property purchased in part or wholly out of such payments. The provisions of this section shall not be construed to prohibit the assignment of insurance otherwise authorized under chapter 19 of this title, or of servicemen's indemnity.

(2) For the purposes of this subsection, in any case where a payee of an educational assistance allowance has designated the address of an attorney-in-fact as the payee's address for the purpose of receiving a benefit check and has also executed a power of attorney giving the attorney-in-fact authority to negotiate such benefit check, such action shall be deemed to be an assignment and is prohibited.

(3) (A) This paragraph is intended to clarify that, in any case

where a beneficiary entitled to compensation, pension, or dependency and indemnity compensation enters into an agreement with another person under which agreement such other person acquires for consideration the right to receive such benefit by payment of such compensation, pension, or dependency and indemnity compensation, as the case may be, except as provided in subparagraph (B), and including deposit into a joint account from which such other person may make withdrawals, or otherwise, such agreement shall be deemed to be an assignment and is prohibited.

(B) Notwithstanding subparagraph (A), nothing in this paragraph is intended to prohibit a loan involving a beneficiary under the terms of which the beneficiary may use the benefit to repay such other person as long as each of the periodic payments made to repay such other person is separately and voluntarily executed by the beneficiary or is made by preauthorized electronic funds transfer pursuant to the Electronic Funds Transfers Act (15 U.S.C. 1693 et seq.).

(C) Any agreement or arrangement for collateral for security for an agreement that is prohibited under subparagraph (A) is also prohibited and is void from its inception.

(b) This section shall prohibit the collection by setoff or otherwise out of any benefits payable pursuant to any law administered by the Secretary and relating to veterans, their estates, or their dependents, of any claim of the United States or any agency thereof against (1) any person other than the indebted beneficiary or the beneficiary's estate; or (2) any beneficiary or the beneficiary's estate except amounts due the United States by such beneficiary or the beneficiary's estate by reason of overpayments or illegal payments made under such laws to such beneficiary or the beneficiary's estate or to the

beneficiary's dependents as such. If the benefits referred to in the preceding sentence are insurance payable by reason of yearly renewable term insurance, United States Government life insurance, or National Service Life Insurance issued by the United States, the exemption provided in this section shall not apply to indebtedness existing against the particular insurance contract upon the maturity of which the claim is based, whether such indebtedness is in the form of liens to secure unpaid premiums or loans, or interest on such premiums or loans, or indebtedness arising from overpayments of dividends, refunds, loans, or other insurance benefits.

(c)(1) Notwithstanding any other provision of this section, the Secretary may, after receiving a request under paragraph (2) of this subsection relating to a veteran, collect by offset of any compensation or pension payable to the veteran under laws administered by the Secretary the uncollected portion of the amount of any indebtedness associated with the veteran's participation in a plan prescribed in chapter 73 of title 10.

(2) If the Secretary concerned (as defined in section 101(5) of title 37) has tried under section 3711(a) of title 31 to collect an amount described in paragraph (1) of this subsection in the case of any veteran, has been unable to collect such amount, and has determined that the uncollected portion of such amount is not collectible from amounts payable by that Secretary to the veteran or that the veteran is not receiving any payment from that Secretary, that Secretary may request the Secretary to make collections in the case of such veteran as authorized in paragraph (1) of this subsection.

(3)(A) A collection authorized by paragraph (1) of this subsection shall be conducted in accordance with the procedures prescribed in section 3716 of title 31 for administrative offset

collections made after attempts to collect claims under section 3711(a) of such title.

(B) For the purposes of subparagraph (A) of this paragraph, as used in the second sentence of section 3716(a) of title 31--

(i) the term "records of the agency" shall be considered to refer to the records of the department of the Secretary concerned; and

(ii) the term "agency" in clauses (3) and (4) shall be considered to refer to such department.

(4) Funds collected under this subsection shall be credited to the Department of Defense Military Retirement Fund under chapter 74 of title 10 or to the Retired Pay Account of the Coast Guard, as appropriate.

(d) Notwithstanding subsection (a) of this section, payments of benefits under laws administered by the Secretary shall not be exempt from levy under subchapter D of chapter 64 of the Internal Revenue Code of 1986 (26 U.S.C. 6331 et seq.).

(e) In the case of a person who--

(1) has been determined to be eligible to receive pension or compensation under laws administered by the Secretary but for the receipt by such person of pay pursuant to any provision of law providing retired or retirement pay to members or former members of the Armed Forces or commissioned officers of the National Oceanic and Atmospheric Administration or of the Public Health Service; and

(2) files a waiver of such pay in accordance with section 5305

of this title in the amount of such pension or compensation before the end of the one-year period beginning on the date such person is notified by the Secretary of such person's eligibility for such pension or compensation, the retired or retirement pay of such person shall be exempt from taxation, as provided in subsection (a) of this section, in an amount equal to the amount of pension or compensation which would have been paid to such person but for the receipt by such person of such pay.

{Pub.L. 85-857, Sept. 2, 1958, 72 Stat. 1229, § 3101; Pub.L. 94-502, Title VII, § 701, Oct. 15, 1976, 90 Stat. 2405; Pub.L. 95-479, Title III, § 301, Oct. 18, 1978, 92 Stat. 1564; Pub.L. 97-295, § 4(74), Oct. 12, 1982, 96 Stat. 1310; Pub.L. 99-576, Title V, § 504, Title VII, § 701(68), Oct. 28, 1986, 100 Stat. 3286, 3296; renumbered § 5301 and amended Pub.L. 102- 40, Title IV, § 402(b)(1), (d)(1), May 7, 1991, 105 Stat. 238, 239; Pub.L. 102-54, § 14(d)(2), June 13, 1991, 105 Stat. 285; Pub.L. 102-83, 4(a)(1), (2)(A)(vii), (b)(1), (2)(E), (4)(C), Aug. 6, 1991, 105 Stat. 403- 405; Pub.L. 102-86, Title V, § 505(a), Aug. 14, 1991, 102 Stat. 426; Pub.L. 101-189, Div. A, Title XIV, § 1404(b)(2), Nov. 29, 1989, 103 Stat. 1586; Pub.L. 102-25, Title VII, § 705(c)(2), Apr. 6, 1991, 105 Stat. 120; renumbered and amended Pub.L. 102-40, Title IV, § 402(b)(1), (d)(1), May 7, 1991, 105 Stat. 238, 239; Pub.L. 102-54, § 14(d)(2), June 13, 1991, 105 Stat. 285; Pub.L. 102-83, § 4(a)(1), (2)(A)(vii), (b)(1), (4)(C), Aug. 6, 1991, 105 Stat. 403-405; Pub.L. 102-86, Title V, § 505(a), Aug. 14, 1991, 102 Stat. 426; Pub. L. No. 108-183, § 702, Dec. 16, 2003.}

Supreme Court, U.S.
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No. 03-1093

In The Supreme Court of the United States

ROLAND A. SHELTON,

Petitioner,

v.

MARYANN C. SHELTON,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Nevada

---

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Were the petitioner's federal law arguments conclusively resolved against him by a final state court consent decree of divorce which he undisputedly failed to appeal?

2. Can a state court make an award of indemnity, under the state common law of contracts, against a party who waives military retirement benefits, thereby depriving his former spouse of a legal interest in those benefits established by a previous final consent judgment?

LIST OF PARTIES BELOW

Roland A. Shelton, petitioner

Maryann C. Mitchell (formerly Maryann C. Shelton), respondent

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The Respondent, Maryann C. Mitchell (formerly Sheldon), respectfully submits that the Petition For Writ Of Certiorari should be dismissed for lack of a substantial federal question, or in the alternative simply denied.

OPINIONS BELOW

The respondent is satisfied with this portion of the Petition.

BASIS FOR JURISDICTION

Contrary to the Petition, this Court does not have jurisdiction to hear an appeal in this case. Under 12 U.S.C. § 1257 (Westlaw 2003), the Supreme Court may hear appeals from state courts only where a substantial federal question is presented. As set forth more fully in part I of the argument section of this brief, this case is fully controlled by the state law of res judicata. Because no substantial issue of federal law remains open for decision, the respondent wife submits that the Court lacks jurisdiction to grant the Petition.

STATEMENT OF THE CASE

This case began as a divorce action filed in 1997 in the state courts of Nevada. The initial pleading, styled as a Joint Petition for Summary Decree of Divorce and signed by both parties, was filed on January 17, 1997. Almost immediately thereafter, on January 24, 1997, the state court granted a consent decree of divorce (App. 13a).

The language of the consent divorce decree is essential to a full understanding of the post-judgment issues. The

consent divorce decree, in language taken directly from the joint divorce petition, provided as follows:

> That the Petitioners have certain *community property* and have agreed to divide it as follows:
>
> A. to Co-Petitioner Roland A. Shelton:
>
> . . . .
>
> 14. One half of military retirement in the amount of $500 and *military disability* in the amount of $174.
>
> B. to Co-Petitioner Maryann C. Shelton:
>
> . . . .
>
> 10. One-half of HUSBAND's military retirement in the amount of $577, until her demise.
>
> That the Co-Petitioners further agree to fairly and equitably divide remaining community property not herein listed.

(App. 13a-14a (emphasis added).)

As the Court can see, both the petition and the divorce decree include a list of assets expressly classified as "community property." Among the assets so classified was $174 per month in the husband's veterans' disability benefits—the only disability benefits the husband was

receiving at the time. The decree also divided the husband's military retirement benefits, a step which both parties agree the state court was permitted to take. The divorce decree was not appealed by either party.

In 1999, over two years after the divorce decree became a final judgment of the state court, the husband ceased compliance with the above-quoted provisions. On November 9, 2000, the wife filed a motion in state court to enforce compliance with the consent divorce decree.

In his response to the wife's petition, the husband argued for the first time in the history of this case that the consent divorce decree was inconsistent with federal law. In particular, he alleged that he had voluntarily elected to waive military retirement benefits in full, and to receive veterans' disability benefits in their place, and that his veterans' disability benefits were not subject to division as a matter of federal law. *See* 10 U.S.C. § 1408 (2003); *Mansell v. Mansell*, 490 U.S. 581 (1989). He offered no explanation for why he had not raised this federal law issue as an objection to the state court divorce decree, which once again unambiguously stated that the husband's disability benefits were *community property* (App. 13a).

The state trial court desired to give the wife relief under state law, but held that relief was barred by this Court's opinion in *Mansell* (App. 11a). The wife appealed to the Nevada Supreme Court, arguing that federal law allowed the wife to claim relief under at least two theories, res judicata and contractual indemnity.

Accepting the wife's arguments, the Nevada Supreme Court reversed the decision below (App. 1a). The court recognized that division of veterans' disability pay was permitted under state law principles of res judicata, and it construed the decree to award the wife $577 per month in

benefits regardless of source, but it did not further address the wife's res judicata argument.

Instead, the court joined the great majority of other states in granting the wife relief on a theory of contractual indemnity. The Petition For Certiorari alleges that the court divided the husband's disability benefits, but this is simply not true. The wife never sought, and the Nevada Supreme Court did not make, an actual division of the husband's disability benefits. Every dollar of the husband's disability benefits has gone and will continue to go directly to the husband.

What the Nevada Supreme Court did was to make an award of monetary damages against the husband under the law of contractual indemnity. The consent divorce decree, which is a contract as well as a judgment, obligated the husband to pay the wife $577 per month from his military retirement pay. Instead of paying the wife the benefit which he promised to pay, the husband *voluntarily* chose to waive his military retirement entirely. That waiver was a breach of the husband's agreement to pay the wife $577 per month from his retirement pay. Both parties agree that state courts are permitted to divide military retirement pay. Because federal law allows an award of indemnity, payable in full from the husband's nondisability assets, the decision of the trial court was reversed and remanded.

If the present holding of the Nevada Supreme Court remains unchanged, the wife expects to receive upon remand contract law damages of $577 per month – the amount of the harm inflicted upon her by the husband's breach of the consent divorce decree. The Nevada Supreme Court has already held that the husband "possesses ample other assets from which to pay his obligation without ever touching his disability pay" (App. 9a).

ARGUMENT

I. THE PETITIONER'S FEDERAL LAW ARGUMENTS ARE CONCLUSIVELY RESOLVED AGAINST HIM BY THE FINAL STATE COURT CONSENT DECREE OF DIVORCE, WHICH HE UNDISPUTEDLY FAILED TO APPEAL.

The cornerstone of the petitioner husband's position in this case is his assertion that federal law prevents state courts from treating veterans' disability benefits as community property. *Mansell v. Mansell*, 490 U.S. 581 (1989). But the husband himself voluntarily signed a joint divorce petition and consent divorce decree which unambiguously stated that $174 per month in disability benefits were community property. That decree, as construed by the state courts of Nevada, awards the wife $577 per month as her share of the husband's retirement benefits, regardless of any future waiver of those benefits. The husband failed to appeal from the consent divorce decree, and it became a final and operative judgment under state law. The husband raised no issue under *Mansell* until several years after the consent divorce decree became final. Because the husband failed to raise his federal issues by appeal from the consent divorce decree, the state court order at issue is fully justified by basic state law principles of res judicata.[1]

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[1]"[A] valid judgment for plaintiff is conclusive not only as to defenses which were set up and adjudicated, but also as to those which might have been raised." *Weisheyer v. Weisheyer*, 54 Nev. 76, 6 P.2d 439, 441 (1932). "The modern view is that claim preclusion embraces all grounds of recovery that were asserted in a suit, as well as those that could have been asserted, and thus has a broader reach than collateral estoppel." *University of Nevada v. Tarkanian*, 110 Nev. 581, 879

The power of state courts to divide veterans' disability benefits under the law of res judicata is established by *Mansell* itself. The parties in *Mansell* were divorced in California in 1979. The divorce decree was based upon a separation agreement. Both the agreement and the decree expressly divided that portion of the husband's military retirement pay which he had waived in order to receive veterans' disability pay. Four years later, the husband filed a motion to reopen the divorce decree, arguing that the waived retirement benefits could not be divided as a matter of federal law. The California trial court denied the motion. The California appellate courts affirmed.

On appeal, this Court reversed the California holding that federal law permits division of disability benefits under the only theory applied in the California state courts – the law of community property. But this Court did not hold that the disability benefits could not be divided under other theories. On the contrary, the Court recognized that they *could* be divided on a theory of res judicata:

> In a supplemental brief, Mrs. Mansell argues that the doctrine of res judicata should have

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P.2d 1180, 1192 (1994), *modified on other grounds, Executive Management v. Ticor Title Ins. Co.*, 114 Nev. 823, 963 P.2d 465 (1998); *see also Dermody v. City of Reno*, 113 Nev. 207, 931 P.2d 1354 (1997); *Gulling v. Washoe County Bank*, 24 Nev. 477, 56 P. 580, 582 (1899) (final decision is still res judicata, "[h]owever erroneous that judgment and decree may be"). The decision below created no right not already recognized by the original consent divorce decree, as construed by the state court. Thus, federal preemption is an issue which could and should have been raised by appeal from that decree. Because the husband failed to raise the issue in such an appeal, he is barred from raising it now.

> prevented this pre-*McCarty* property settlement from being reopened. *McCarty v. McCarty*, 453 U.S. 210, 101 S. Ct. 2728, 69 L. Ed. 2d 589 (1981). The California Court of Appeal, however, decided that it was appropriate, under California law, to reopen the settlement and reach the federal question. [Citation omitted.] *Whether the doctrine of res judicata, as applied in California, should have barred the reopening of pre-McCarty settlements is a matter of state law over which we have no jurisdiction.*

Id. at 586 n.5. The emphasized passage clearly recognizes that state courts are permitted to hold that a final order dividing veterans' disability benefits is beyond collateral attack. Such an order is not merely permitted by federal law, but indeed beyond the jurisdiction of federal appellate review.

Res judicata was more than a theoretical issue in the *Mansell* litigation. After this Court's reversal, the case returned to the California Court of Appeals. Despite this Court's published opinion, that court refused to hold that the husband's veterans' disability benefits were separate property. "The Supreme Court's [opinion] does not change the question on review; it merely requires that we view it from a different perspective." *Mansell v. Mansell*, 217 Cal. App. 3d 219, 265 Cal. Rptr. 227, 231 (1989). Considering directly the issue of whether res judicata prevented reopening of the divorce decree, the court held that the facts showed no basis for reopening the judgment under California law. Even though the original trial court acted improperly by dividing disability benefits, the husband "consented to said act when he signed the stipulated property settlement agreement, and he is therefore barred from complaining." 265 Cal. Rptr. at 233. Because the divorce decree could not be reopened under California law, the court once again affirmed the trial court decision denying the husband relief, and ordering him to

continue paying the wife 50% of his veterans' disability benefits.

The husband filed a second petition, styled as a Petition For Writ Of Mandamus Or Certiorari, to review the post-remand *Mansell* decision, but the Petition was denied. *Mansell v. Mansell*, 498 U.S. 806 (1990).[2] The end result of the *Mansell* litigation was therefore that the husband's disability benefits were actually divided, under a theory of res judicata.

This Court has also approved res judicata as a basis for dividing military service benefits upon divorce in an opinion with precedential value. *Mansell* did not create a new rule of federal preemption; it merely upheld the continuing validity of the broader opinion in *McCarty v. McCarty*, 453 U.S. 210 (1981). *McCarty* held that federal law prevented division of any post-retirement military service benefit upon divorce.

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[2]The wife recognizes the fundamental axiom that a denial of certiorari is not an adjudication on the merits. *Hopfmann v. Connolly*, 471 U.S. 459, 461 (1985); *Maryland v. Baltimore Radio Show*, 338 U.S. 912 (1950) (opinion of Justice Frankfurter denying certiorari). Nevertheless, a denial of certiorari does establish the opinion under review as law of the case in the specific proceedings involved. *E.g., Constant v. United States*, 929 F.2d 654, 657 (Fed. Cir. 1991) ("[T]he denial of his petition for certiorari made the legal conclusions in our prior decision final and law of the case"). Thus, the denial of the second petition for certiorari in *Mansell* established *for purposes of the Mansell litigation* that the husband's veterans' disability benefits were properly divided on a theory of res judicata, the basis set forth in the post-remand California decision. That fact in turn is additional evidence that the Court meant what it said in footnote 5 of its *Mansell* opinion, stating that division of disability benefits based upon state law principles of res judicata would not present a federal question.

After *McCarty* was decided, Congress enacted 10 U.S.C. § 1408 (2003), which permits division of military retirement pay under certain conditions, but which is silent on disability benefits. *Mansell* held that § 1408 overruled *McCarty* only with respect to benefits which were expressly declared to be divisible, and that statute did not overrule the broad preemption rule of *McCarty*. Thus, *McCarty* created the rule; *Mansell* confirmed that the rule remained valid where not expressly overturned by § 1408.

In a case decided shortly after *McCarty*, the courts of California expressly and directly held that *McCarty* did not prevent division of military retirement benefits on a theory of res judicata. *In re Marriage of Sheldon*, 124 Cal. App. 3d 371, 177 Cal. Rptr. 380 (1981). This Court refused to grant a Petition For Certiorari, but it did not simply deny the Petition. Instead, the Petition was dismissed for want of a substantial federal question. *Sheldon v. Sheldon*, 456 U.S. 941 (1982). Dismissal for want of a substantial federal question is an adjudication on the merits. *Hicks v. Miranda*, 422 U.S. 332, 344 (1975); *White v. White*, 731 F.2d 1440, 1443 (9th Cir. 1984); *Evans v. Evans*, 75 Md. App. 364, 541 A.2d 648 (1988) (specifically recognizing the precedential effect of the dismissal in *Sheldon*). *Sheldon* is therefore precedential authority from this Court agreeing with footnote 5 in *Mansell* that state courts may divide post-divorce military service benefits under a theory of res judicata, even if the original order dividing those benefits violated federal law.

In the present case, the parties' consent divorce decree expressly sets forth a list of "certain community property" (App. 13a). Item 14 on that list includes "military disability in the amount of $174" per month (*id.*), all of the disability benefits to which the husband was then entitled. While the veterans' disability benefits described were awarded to the husband, the consent decree clearly makes a finding of law that all items on the list, including the husband's disability

benefits were community property. Since a consent decree is both a judgment and a contract, *Frew By and Through Frew v. Hawkins*, 124 S. Ct. 899, 903 (2004); *United States v. ITT Continental Baking Co.*, 420 U.S. 223, 237 n.10 (1975), the decree is binding on the husband with the same force as any other court judgment.

The consent divorce decree's finding that the husband's disability benefits were community property is a clear violation of the petitioner husband's interpretation of *McCarty* and *Mansell*. If state divorce courts are not permitted to treat veterans' disability benefits as community property, why did the husband sign a consent divorce decree treating his disability benefits as community property? Given that such a decree was entered, why did the husband not raise his federal law issues in a direct appeal from the divorce decree? There is tremendous inconsistency between the words of the husband's present Petition For Certiorari, and the husband's own actions in signing and failing to appeal the consent decree.

The wife realizes that the consent divorce decree did not actually divide the husband's disability benefits. But Nevada state law does not require that all benefits described as community property be actually divided. *E.g., Fox v. Fox*, 81 Nev. 186, 196, 401 P.2d 53, 58 (1965) ("The court was not compelled to make an exact equal distribution to the parties of either the community property itself or the value thereof"). Property settlements in divorce cases, whether made by agreement or court decree, often divide the community estate by giving each spouse full ownership of some assets. *E.g.*, 401 P.2d at 58. For example, a settlement might make an equal division by giving the husband his retirement benefits, and the wife a marital home of equivalent present value. Since the consent divorce decree clearly described the husband's disability benefits as community property, the parties and the court necessarily must have taken those benefits into account

in determining the overall distribution of the entire community estate. Even though they were not actually divided, they were still treated as community property by the consent divorce decree, which the husband requested and then failed to appeal.

Moreover, the Nevada Supreme Court clearly construed the consent divorce decree to award the wife $577 per month from the husband, so long as the husband has any source from which the payments can be made other than disability benefits. This holding is a pure matter of state contract law; construction of a state court divorce decree is not a federal question. Indeed, the husband's Petition does not seem to argue that this court can review the construction question. He argues only that the state court's construction violates federal law. But the state court was construing the original consent divorce decree, which the husband requested and failed to appeal. Since the decree expressly classified the husband's disability benefits as community property, its construction by the state court is surely not unreasonable or unforeseeable.

Because the husband lost the state law construction issue in state court, the decree has provided ever since its entry that the husband must pay the wife $577 per month from his assets, other than veterans' disability benefits. If that construction violated federal law, the husband's remedy was to refuse to agree to the consent decree, raise his federal law arguments in the original divorce hearing, and appeal any adverse judgment to this Court. By signing the consent judgment and failing to appeal from it, the husband lost any argument that the decree violated federal law.

The wife recognizes that the Nevada Supreme Court did not expressly rely upon res judicata. Like the first California appellate opinion in *Mansell*, the present opinion does not reach the question, finding instead that the benefits

at issue are divisible under contract law. But the wife "may, of course, defend the judgment below on any ground which the law and the record permit." *Smith v. Phillips*, 455 U.S. 209, 215 n.6 (1982). "In the review of judicial proceedings the rule is settled that, if the decision below is correct, it must be affirmed, although the lower court relied upon a wrong ground or gave a wrong reason." *Helvering v. Gowran*, 302 U.S. 238, 245 (1937).

The wife argued res judicata in the Nevada Supreme Court. In its opinion, the court below expressly held that disability benefits can be divided under res judicata (App. 6a n. 14), and it expressly construed the original consent divorce decree to award the wife $577 per month regardless of source (App. 9a). While the court below chose to rely on a broader holding that federal substantive law permits division of disability pay by contract, this Court reviews the result reached, not the reasoning used. If the judgment below can actually be defended on the basis of res judicata, it must be affirmed upon review by this Court. *Helvering*.

A favorable ~~ruling on~~ res judicata is in any event implicit in the holding below. The state court clearly held that the consent divorce decree, which the husband did not appeal, awarded the wife $577 per month regardless of source. There can further be no doubt that the consent divorce decree described the husband's disability benefits as community property. The state court did not add language to the consent divorce decree on either point; the language to which the husband objects has been present in the decree since it was entered. Thus, the husband could and should have raised his federal law issues in appeal from that decree.

If this Court were to rule against the wife on the substantive question presented here, the wife would be free to reassert her procedural res judicata argument upon remand. The Nevada courts would then be free to find—*as the California*

Court of Appeals actually did find on remand in Mansell – that the consent divorce decree is beyond collateral attack. If the husband were to file a second Petition For Certiorari, this Court could find itself in the awkward position of refusing to review a decision which reaches (under a theory of res judicata) the exact same end result which the Court previously rejected. If the decision below can actually be defended on the basis of res judicata, the prudent option is to dismiss or deny the Petition.

The husband's failure to raise his federal issues on appeal from the consent divorce decree inflicted substantial prejudice upon the wife. If the husband had raised his federal issue at that time, and this Court had agreed with the husband that the benefits at issue cannot be divided under the law of contracts, the wife would have had alternate remedies. In particular, she would certainly have asked the original trial court to reserve jurisdiction to make an award of alimony in response to any increased financial need arising from a future waiver of military retirement benefits by the husband.[3] By waiting until the present time to raise his federal issues, the husband has deprived the wife and the state court of their ability to adjust other portions of the divorce decree in response to this Court's holding. The loss of that ability unfairly prejudices the wife. It is not unreasonable to insist that those who desire to invoke rights under *Mansell* refrain

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[3] *E.g., Kramer v. Kramer*, 252 Neb. 526, 567 N.W.2d 100 (1997) (*Mansell* did not prevent state court from granting additional alimony to wife, who needed support after husband extinguished her share of his military retirement benefits by electing to receive disability benefits). If the husband's federal law arguments had succeeded on the merits, the consent divorce decree would have been reversed, so the wife's waiver of alimony in that decree would not have been an obstacle.

from consenting to a divorce decree classifying veterans' disability benefits as community property, and that they appeal from such a decree if it is granted.

The Nevada Supreme Court in this case did not divide disability benefits as a matter of first instance. It construed a final state court judgment to award the wife $577 per month from the husband, regardless of source, and it enforced that judgment against the husband. The construction of state court consent divorce decrees is surely not a federal question. If the husband believed that the consent decree violated federal law, his remedy was to appeal from the consent decree. Because the husband filed no such appeal, and allowed the consent divorce decree to become a final judgment, the state court judgment at issue was proper under the state law principles of res judicata. The Petition For Certiorari should be dismissed for lack of substantial federal question, or in the alternative simply denied.

II. FEDERAL LAW DOES NOT PREVENT STATE COURTS FROM MAKING AN AWARD OF INDEMNITY, UNDER THE COMMON LAW OF CONTRACTS, AGAINST A PERSON WHO WAIVES MILITARY RETIREMENT BENEFITS, THEREBY DEPRIVING HIS FORMER SPOUSE OF A LEGAL INTEREST IN THOSE BENEFITS ESTABLISHED BY A PREVIOUS FINAL CONSENT JUDGMENT.

Before considering this issue, it is important to have a clear understanding of the state court holding in this case. The state court did not divide the husband's veterans' disability benefits. Every dollar of those benefits has gone and continues to go directly to the husband.

Instead, the wife sought and the Nevada Supreme Court essentially permitted an award of damages against the husband. The basis for that award was the theory of indemnity, a part of the common law of contracts. Under that theory, if O signs a contract agreeing to transfer Blackacre to A, but then actually transfers Blackacre to B, the transfer to B is a breach of the contract between O and A. Without rescinding the transfer to B, who may well be a bona fide purchaser with no awareness of O's wrongdoing, the court is permitted to make an award of damages to A. *See generally* Restatement (Second) of Contracts §§ 250(b), 253(1) (1981); *Hilton Hotels v. Butch Lewis Productions, Inc.*, 107 Nev. 226, 808 P.2d 919 (1991) (parties to a contract have an implied obligation not to destroy the right of other parties to receive benefits under a contract).

In this case, the husband agreed to a consent divorce decree which gave the wife $577 from his military retirement benefits. He then voluntarily waived military retirement benefits to receive increased veterans' disability benefits. The effect of this voluntary waiver was to deprive the wife of the $577 per month in retirement benefits which the husband promised to pay her. The wife does not seek any portion of the husband's disability benefits. She recognizes that those benefits belong to the husband, just as in the above hypothetical, Blackacre belongs to B. But the husband cannot expect to escape all consequences of his breach of contract. The wife seeks exactly the same remedy as in the above hypothetical: an award of damages under the common-law theory of contractual indemnity.

The award of damages at issue here is not at all similar to division of disability benefits. To begin with, the amount of the wife's award does not depend at all on the amount of disability benefits received by the husband. The husband is not being forced to share disability benefits with his wife; he is being forced to pay damages for depriving the wife of her

contractual right to receive $577 per month from his retirement benefits. The amount received by the wife would not decrease if Congress halved the amount of the husband's disability benefits, or even eliminated those benefits entirely. Likewise, the wife's award would not increase if Congress doubled the amount of the husband's disability benefits. Indeed, the result would be the same even if the husband had voluntarily waived military retirement pay for some purpose which had no relationship to disability benefits.[4] The wife's award bears absolutely no relationship to the amount of disability benefits received by the husband.

Moreover, the decision below expressly suggests that the award of damages to the wife will not invade any of the husband's disability pay. "Roland possesses ample other assets from which to pay his obligation without ever touching his disability pay" (App. 9a). Thus, under the decision below, the husband will continue to receive all of his disability

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[4]Such awards have actually been made in several reported decisions. The most significant is *In re Marriage of Gaddis*, 191 Ariz. 467, 470, 957 P.2d 1010, 1013 (Ct. App. 1997), *cert. denied*, 525 U.S. 826, *reh'g denied*, 525 U.S. 1013 (1998), holding that the husband must compensate the wife for military retirement benefits waived to receive post-divorce civil service retirement benefits. *See also In re Marriage of Beltran*, 183 Cal. App. 3d 292, 227 Cal. Rptr. 924 (1986) (making similar award against husband who lost retirement benefits after military tribunal convicted him of sexual misconduct with a minor); *Collins v. Collins*, 139 Ohio App. 3d 900, 746 N.E.2d 201 (2000) (making similar award against husband who lost unvested military retirement benefits through simple failure to reenlist); *Leadingham v. Leadingham*, 120 Ohio App. 3d 496, 698 N.E.2d 465 (1997) (making similar award against husband who lost private civilian pension when he was fired for drug abuse).

benefits, and he will not be required to share any part of those benefits with the wife. The decision below did not divide disability benefits; it awarded contract-law damages against the husband for failing to comply with his agreement to pay the wife$577 per month in retirement benefits.

The Petition For Certiorari relies upon essentially two sources: federal law preventing state courts from dividing disability benefits under the law of community property or equitable distribution, *Mansell* and 38 U.S.C. § 5301 (Westlaw 2004), which prevents recipients of veterans' disability pay from assigning it to others. Neither of these two sources provides any support for the husband's position. Veterans' disability benefits have not been divided under community property law, equitable distribution law, contract law, or any other law, because the husband alone retains every dollar of disability pay he collects. The wife's award can be fully satisfied from the husband's nondisability assets. An award of contract law damages against the husband, made from assets outside the scope of *Mansell*, does not violate federal law.

Section 5301 is irrelevant for the same reason: no assignment of veterans' disability benefits has occurred. The husband never promised to give the wife any portion of his disability benefits; the wife never claimed such a portion; and no state court ever awarded such a portion. An award of contract law damages against the husband, payable fully from nondisability assets, is simply not an assignment of veterans' disability pay.

The wife also notes that § 5301 has generally been construed to protect recipients only against third-party creditors, and not against family members. In particular, in *Rose v. Rose*, 481 U.S. 619 (1987), the Court held that the statute (then numbered as 38 U.S.C. § 3101) did not prevent disability benefits from being used as a source for child support. The

court reasoned that the disability benefits were intended by Congress to support "disabled veterans *and their families*." *Id.* at 630 (quoting S. Rep. No. 98-204 at 24, 1984 U.S.C.C.A.N. 4479, 4488) (Court's emphasis). "Congress clearly intended veterans' disability benefits to be used, in part, for the support of veterans' dependents." *Rose*, 481 U.S. at 631. For precisely the same reason, the anti-assignment clause does not bar voluntary agreements to divide veterans' disability benefits. The assignment is made not to benefit a third-party creditor, but to benefit a family member – a person within the class of persons Congress intended to benefit.

The Petition seems to suggest that the Court should reconsider *Rose*'s holding that veterans' disability benefits are intended for the benefit of the veteran's family (Petition at 16, 20-21). *There is not the slightest indication that Congress intended to give disabled veterans free license to ignore their family responsibilities.* The recent amendment to § 5301, quoted in the Petition at 20, provides no indication on its face that it bars assignments to family members. Indeed, the failure of Congress to expressly extend § 5301 to bar assignments to family members provides a strong indication that Congress approves of the *Rose* decision. The Petition misses no chance to claim that Congress has approved of the 1989 decision in *Mansell* by failing to overrule it, yet persists in arguing that Congress's failure to overrule the 1987 decision in *Rose* means little. From all indications, Congress continues to be committed to the position that veterans' disability benefits are intended, in part, to support veterans' dependents.

The issue presented here may not recur frequently in future cases. As the Petition recognizes (Petition at 2 n.1), federal law has begun to permit some military retirees to receive both veterans' disability benefits and military retirement pay. National Defense Authorization Act, Pub. L. No. 108-136, § 641, 117 Stat. 1392 (2003). Concurrent receipt of both benefits eliminates the need for election, thus avoiding

the waiver issue which lies at the heart of both *Mansell* and the present case. While concurrent receipt is being phased in rather than adopted immediately, its full adoption would render the present issue moot in the great majority of cases, as receipt of disability benefits would not reduce the share of retirement benefits payable to a former spouse.

The decision below is far from the first case to make an award of contractual indemnity against a husband who waived military retirement pay to receive other benefits. On the contrary, the great majority of state courts to consider the issue have found that this sort of award does not violate federal law.

One of the first decisions to address the issue is *Owen v. Owen*, 14 Va. App. 623, 419 S.E.2d 267 (1992). In that case, the parties' separation agreement divided the husband's military retirement pay. Included in the agreement was a specific express promise by the husband that he would not take action to defeat the wife's award. When the husband subsequently elected to receive disability pay, the wife sought and obtained an award of damages for violation of the agreement and decree. The Virginia Court of Appeals expressly affirmed this award, holding that it was an award of damages and not a division of any specific benefit. "Such an arrangement does not offend the federal prohibition against a direct assignment of veterans' disability pay by property settlement agreement." 419 S.E.2d at 269.

For additional state court cases holding that enforcement of an express indemnity provision does not violate federal law, see *Janovic v. Janovic*, 814 So. 2d 1096 (Fla. Dist. Ct. App. 2002); *In re Strassner*, 895 S.W.2d 614, 618 (Mo. Ct. App. 1995) ("[T]he trial court did not prospectively divide disability benefits, but instead provided a manner of enforcing the property division contained in the original decree"); *Scheidel v. Scheidel*, 129 N.M. 223, 4 P.3d 670 (Ct. App. 2000).

For additional cases holding that enforcement of an indemnity clause does not violate *Mansell*, while remanding on the state law question of whether such a provision was present on the facts, see *Harris v. Harris*, 195 Ariz. 559, 991 P.2d 262 (Ct. App. 1999), and *In re Marriage of Krempin*, 70 Cal. App. 4th 1008, 83 Cal. Rptr. 2d 134 (1999).

The wife recognizes that the agreement in this case does not contain an express indemnity clause. Instead, the Nevada Supreme Court construed the agreement to contain an implied indemnity clause. The presence of an indemnity obligation is a pure question of state contract law, over which this Court has no jurisdiction. The Nevada decision is fully consistent with years of contract law jurisprudence, summarized in Restatement (Second) of Contracts §§ 250(b), 253(1) (1981), holding that a person who contracts to give property to one person must pay damages if he conveys it to another. Since the highest court of state resort has already found an implied indemnity obligation to be present here, the presence of that obligation is settled. The only federal issue is whether the obligation violates *Mansell*.

Other state courts have recognized this point by enforcing an implied indemnity obligation. In *McHugh v. McHugh*, 124 Idaho 543, 861 P.2d 113 (Ct. App. 1993), the husband agreed to pay the wife a portion of his military retirement pay. The agreement further provided that the amount of military retirement pay would not be increased or decreased in the future. There was no express indemnity provision. The husband subsequently elected to receive increased disability pay, reducing his retirement pay, and the wife sought an order enforcing the husband's obligation to continue paying the original amount. The trial court entered such an order, reasoning that it was entitled to enforce the plain language of the agreement. On appeal, the court expressly held that the trial court had not violated federal law:

> The parties negotiated for and *mutually agreed* to a division of military retirement pay which granted Elisabet a specific monthly sum. They further agreed that this sum would not be increased or decreased in the future "for any reason" except by application of cost of living increases. The two supplemental orders issued by the court did not alter this agreed-to division of the asset, but served simply to enforce it. In short, there is no new division of the retirement pay, and Richard's argument [for federal preemption] does not apply.

861 P.2d at 115. Thus, the court expressly held that federal law permits the court to enforce a prior order incorporating an agreement in which the husband had promised to pay the wife *retirement* benefits. *See also Troxell v. Troxell*, 28 P.3d 1169 (Okla. Ct. App. 2001) (likewise holding that an order to pay a portion of military retirement pay remains binding, even if the husband waives military retirement pay for disability benefits, so long as the order is enforced against other assets and not disability benefits).

An excellent recent state court opinion applying the theory is *In re Marriage of Neilsen*, 341 Ill. App. 3d 863, 792 N.E.2d 844 (2003). There, as in this case, the parties signed an agreed order dividing the husband's military retirement benefits. Some years later, the husband retired and elected to receive disability benefits. The trial court initially made an award of indemnity, equal to the amount of *retirement* benefits lost by the wife when the husband elected disability benefits. It then changed course, however, and stated the award as 22.5% of the husband's retirement and disability pay.

The Illinois Court of Appeals reversed the second order, holding that the direct award of a percentage of the husband's disability pay was a clear violation of *Mansell*. But

the court expressly held that the first order entered by the trial court was consistent with federal law, so long as it was payable from the husband's nondisability assets:

> Mark certainly had a legal right to receive disability benefits, but his doing so caused a diminution in the amount of his retirement pay that Susan had been receiving for over three years. Mark's decision frustrated the parties' intent and the trial court's judgment for dissolution. Indeed, to allow Mark to unilaterally diminish Susan's interest in his military pension would constitute an impermissible modification of a division of marital property. As such, we affirm the trial court's order of November 3, 2000, in which it ruled that Susan was entitled to an amount equal to 25% of Mark's military pension as it existed on the date he retired. Because the trial court's November 3, 2000, order does not directly assign Mark's military disability pay, it does not offend the United States Supreme Court's ruling in *Mansell*.

792 N.E.2d at 849. "On remand, the trial court must determine if Mark is free to satisfy his obligation with assets other than his disability benefits, and draft a new order accordingly. This will ensure conformity with *Mansell*." *Id.*

For additional cases enforcing an implied indemnity provision which did not actually award the former spouse a share of disability benefits, see *Dexter v. Dexter*, 105 Md. App. 678, 661 A.2d 171, *cert. denied*, 341 Md. 27, 668 A.2d 36 (1995); *Krapf v. Krapf*, 439 Mass. 97, 786 N.E.2d 318 (2003); *White v. White*, 152 N.C. App. 588, 568 S.E.2d 283 (2002), *aff'd per curiam*, 357 N.C. 153, 579 S.E.2d 248 (2003); *Hisgen v. Hisgen*,

554 N.W.2d 494 (S.D. 1996); and *Johnson v. Johnson*, 37 S.W.3d 892 (Tenn. 2001).

The wife recognizes, of course, that this Court is not bound by any of the above state court opinions. But the Nevada Supreme Court is clearly not alone in holding that an award of indemnity for a lost share of *retirement benefits*, under the common law of contracts, does not violate *Mansell*'s prohibition against division of *disability benefits*. On the contrary, the decision below is supported by the settled consensus of state court decisions. The presence of such a consensus is one significant factor supporting the wife's position.

Accepting the wife's position does not weaken *Mansell* in any material way. In all of the above cases, the initial division of retirement benefits was made by agreement between the parties. The former spouse did not assert any right, under law or contract, to any share of the disability benefits at issue; the former spouse merely demanded compliance with the contract, which was *voluntarily* signed by the service member. Service members who wish to avoid a future award of indemnity need only refrain from agreeing to give a specific amount from their retirement benefits to their former spouses. Moreover, even where a contract exists, none of the cases awards an actual percentage of disability benefits to the innocent spouse, and *Neilsen* actually reversed such an award. The cases therefore fully recognize the fundamental rule of *Mansell* that disability benefits cannot be treated as community property.

In an attempt to generate an issue of policy, the Petition alleges that state courts are divided over the issue of whether veterans' disability benefits can be directly divided by contract. This is indeed so, but the split in authority is not relevant here. The consent divorce decree clearly awards to the husband all of his disability benefits; the wife does not and

the Nevada Supreme Court did not contest the point. This is therefore *not* an appropriate case to resolve the question, noted but not addressed in footnote 6 of *Mansell*, 490 U.S. at 587, of whether a contract dividing disability benefits is enforceable under federal law.[5] Even less appropriate for review are such remedies as redivision of the marital estate or imposition of a constructive trust, as those remedies were neither sought nor imposed in the court below. The Petition requests what would be in effect an advisory opinion on many issues which may be of public interest, but which are not presented by the facts.

If the wife's res judicata argument is rejected, this case does squarely present the single question of whether a state court can make an award of contractual indemnity against a military spouse who waives military retirement benefits after agreeing to pay a portion of those benefits to a former spouse. But this is not a question on which state courts are significantly divided. As noted above, state courts generally agree with the wife's position that an award of contractual indemnity based upon waiver of *retirement* benefits is not equivalent to a division of *disability* benefits. There are, of course, decisions going both ways on the factual question of

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[5]*Mansell*, *McCarty*, and 10 U.S.C. § 1408 limit the ability of state courts to treat disability benefits *as community property*. But when disability benefits are divided by agreement between the parties, they are not necessarily being treated as community property, for contracts dividing a spouse's separate property are universally enforceable under state law. Laura W. Morgan & Brett R. Turner, *Attacking and Defending Marital Agreements* § 3.04 n.9 (2001). The question of whether disability benefits can be divided by contract is therefore much broader than the question of whether disability benefits can be treated as community property, and divided against the will of the owning spouse.

whether an express or implied indemnity provision is present, but that is an issue of contract construction controlled fully by state law.

The Petition's discussion of supporting state law is heavily tainted by its insistence that disability benefits were divided in this case. As noted above, that simply did not happen. Almost all of the state court cases cited by the Petition in support of its position hold simply that federal law prohibits division of *disability benefits*. Those cases are not relevant here, for disability benefits are not being divided.

The only case cited in the Petition which clearly focuses upon the present indemnity theory is *In re Marriage of Pierce*, 982 P.2d 995 (Kan. Ct. App. 1999). *Pierce* was a 2-1 decision holding that no indemnity obligation existed on the facts, as a matter of pure state law. The court strongly suggested that an indemnity obligation would be enforceable if it existed; indeed, it criticized the wife for failing to request that an express indemnity provision be included in the agreement. This criticism makes little sense if the court intended to hold that federal law bars recovery on any indemnity theory. The respondent wife therefore submits that there is no substantial state court authority holding that an award of indemnity (as distinguished from an actual division of disability benefits) is prohibited by *federal* law. If such authority exists, it is very small in comparison to the large body of state court case law applying the indemnity theory.

The mere fact that the husband's disability benefits cannot be divided under the law of community property, as a matter of substantive federal law, does not mean that federal law bars an award of indemnity if the election of those benefits breaches a contract. In *Mobil Oil Exploration & Producing Southeast, Inc. v. United States*, 530 U.S. 604 (2000), an oil company applied for a license to drill for oil off the North Carolina coast. It signed a lease with the federal government,

in which the government promised to grant the license if the proper requirements were met. The requirements were met, but shortly before the government certified this fact, new federal legislation was passed placing a moratorium on the licenses at issue. Based upon the new legislation, the government denied the license, and the company sued for breach of contract. This Court held that the new legislation was a voluntary action taken by one party to the contract (the United States) which rendered performance impossible. Therefore, the enactment of the legislation was a breach of the contract. The court expressly rejected the dissent's view that adoption of legislation is not the type of action which can constitute breach of contract. There is no doubt that federal law permits Congress to enact a moratorium on oil drilling licenses, but there is equally no doubt that the government must pay damages if it uses that power to breach an existing contract. Likewise, while no one doubts that substantive federal law prohibits a state court from dividing veterans' disability benefits under a theory of community property, a spouse who elects those benefits must still pay damages if the election deprives a former spouse of *retirement* benefits due under an existing contract.

The Petition makes the amazing suggestion that the present case does not involve an indemnity obligation (Petition at 18). There is admittedly no express indemnity obligation in the consent divorce decree. But the law of contracts clearly provides that a promise to give Blackacre to A contains an implied promise not to give Blackacre to B. Restatement (Second) of Contracts §§ 250(b), 253(1). By agreeing to give the wife $577 per month from his retirement benefits, the husband implicitly agreed not to give that same $577 to anyone else, including to the federal government as part of a waiver of military retirement pay. Thus, the Nevada Supreme Court construed the present agreement to contain an implied indemnity provision. The court could conceivably have ruled otherwise, for as the court itself noted, the consent

decree of divorce is ambiguous (App. 8a). But the presence of an implied indemnity obligation is a question of contract construction, controlled by state law, and well outside the jurisdiction of this Court. The state court of last resort has held that an implied indemnity obligation exists here, and that state law determination is absolutely binding for purposes of Supreme Court review.

Finally, the Petition at various points asserts that the will of this Court as expressed in *Mansell* is being frustrated. This contention assumes that this Court in *Mansell* decided, as a matter of policy, that military service members have some form of protected right to waive military retirement pay, to the great prejudice of their spouses, and that federal law bars state courts from recognizing any remedy whatsoever for the unfairness.

Mansell, however, was not a policy-based opinion. Every opinion written in *Mansell* recognized that the result reached inflicted serious and arguably unfair harm upon military spouses. The majority opinion did not approve that harm as a matter of policy. It held, rather, that one particular proposed remedy for the harm—division of the benefits at issue under the law of community property—was inconsistent with the holding in *McCarty* that division of such benefits requires express Congressional authorization.

At no point did *Mansell* hold that other remedies for the same harm could not be recognized. On the contrary, as discussed in part I *supra*, footnote 5 of *Mansell* expressly held that federal law would permit division of disability benefits under a theory of res judicata, and the benefits at issue in *Mansell* were ultimately divided on that basis upon remand. Likewise, footnote 6 noted but refused to resolve the question of whether a property settlement agreement dividing veterans' disability benefits can be enforced under the common law of contracts. There is no indication in *Mansell* that this Court

adopted any rule of policy against mitigating the harm which results from a waiver of military retirement pay – so long as the remedy chosen is consistent with federal law.

The remedy applied by the Nevada Supreme Court in this case does not violate any principle of federal law. It gives the wife no interest in the husband's veterans' disability benefits. It can be fully satisfied without invading a single dollar that the husband receives as disability benefits from the federal government. Its amount is not tied in any way to the amount of the husband's disability benefits. All the state court has done is to award damages against the husband for waiving his military retirement benefits, in the face of a contract and consent divorce decree promising to pay the wife $577 per month from those benefits. The award can be paid from the husband's nondisability assets alone. This is not a violation of federal law; it is a routine award of damages under the state law of contractual indemnity. Such an award does not violate *Mansell*.

CONCLUSION

For the reasons stated above, the respondent wife respectfully requests that the Petition For Writ Of Certiorari be dismissed for lack of a substantial federal question, or in the alternative simply denied.

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